Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. GRIFFIN, III,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a speech restriction that confers unbridled discretion on government officials to grant or deny permission to speak in a nonpublic forum violates the First Amendment.

II. Whether a speech restriction that is not viewpoint neutral, and which permits government officials to delay indefinitely in granting or denying permission to speak in a nonpublic forum, violates the First Amendment.

PARTIES TO THE PROCEEDING

The petitioner in this matter is Patrick J. Griffin, III, an individual.

Respondent is the Secretary of the Department of Veterans Affairs.

RELATED CASES

This case is related to *Patrick J. Griffin, III v. Dept. of Veterans Affairs,* Supreme Court Case No. 01-1687 (*"Griffin I"*), filed May 13, 2002. In *Griffin I,* petitioner Patrick J. Griffin, III challenges the application of 38 C.F.R. § 1.218(a)(14) and related regulations of the Department of Veterans Affairs ("VA") to his daily display of a full-sized, historically accurate Confederate flag at Point Lookout Confederate Cemetery (the "Cemetery"), an all-Confederate cemetery in St. Mary's County, Maryland, owned and operated by the VA. Over 3,300 Confederate soldiers who died in captivity at Point Lookout prison camp are buried at the Cemetery. The instant petition represents Mr. Griffin's facial challenge to 38 C.F.R. § 1.218(a)(14). Pursuant to 38 U.S.C. § 502, such a challenge must be brought in the United States Court of Appeals for the Federal Circuit. Question I. of this petition is substantially the same as Question III. of the *Griffin I* petition.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Patrick J. Griffin, III respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in *Patrick J. Griffin, III v. Secretary of Veterans Affairs, et al.,* 288 F.3d 1309, 2002 WL 826931 (Fed. Cir. 2002).

OPINIONS BELOW

The decision of the Federal Circuit Court of Appeals is reported as shown above and is set out hereinafter as Appendix A.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Federal Circuit had jurisdiction over this matter pursuant to 38 U.S.C. § 502. The judgment of the Court of Appeals was entered on April 30, 2002.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case is brought under the First Amendment to the United States Constitution, which provides in relevant part: "Congress shall make no law... abridging the freedom of speech...."

The case involves the facial constitutionality of 38 C.F.R. § 1.218(a)(14), which provides:

(14) Demonstrations.

> (i) All visitors are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited. Jogging, bicycling, sledding and other forms of physical recreation on cemetery grounds is [sic] prohibited.
>
> (ii) For the purpose of the prohibitions expressed in this paragraph, unauthorized demonstrations or services shall be defined as, but not limited to, picketing, or similar conduct on VA property; any oration or similar conduct to assembled groups of people, unless the oration is part of an authorized service; the display of any placards, banners, or foreign flags on VA property unless approved by the head of the facility or designee; disorderly conduct such as fighting, threatening, violent, or tumultuous behavior, unreasonable noise or coarse utterance, gesture or display or the use of abusive language to any person present; and partisan activities *i.e.* those involving commentary or actions in support of, or in opposition to, or attempting to influence, any current policy of the Government of the United States, or any private group, association, or enterprise.

The case involves whether § 1.218(a)(14) is made more definite by National Cemetery Service Handbook 3220, "Flags in VA National Cemeteries," April 30, 2001 (the "New Flag Manual" or "NFM"), a true and correct copy of which is attached hereto as App. B. The NFM's predecessor regulations are attached as App. C.

STATEMENT OF THE CASE

A. Point Lookout Confederate Cemetery.

Point Lookout, Maryland is the site of one of the largest prison camps maintained by the United States during the Civil War. This case arises out of a request by Petitioner Patrick J. Griffin, III to display a historically accurate Confederate flag on a daily basis at Point Lookout Confederate Cemetery (the "Cemetery"), an all-Confederate cemetery maintained by the Department of Veterans Affairs ("VA"), where 3,300 Confederate dead are interred in a mass grave. The VA, through its National Cemetery Service ("NCS"), owns and controls the Cemetery.

B. 38 C.F.R § 1.218(a)(14).

Section 1.218(a)(14)(i) provides that, "on VA property... any service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited." The definition of "unauthorized demonstration," set forth in subsection (ii), includes, but is not limited to:

> ... any oration or similar conduct to assembled groups of people, unless the oration is part of an authorized service; the display of any placards, banners, or foreign flags on VA property unless approved by the head of the facility or designee... and partisan activities *i.e.* those involving commentary or actions in support of, or in opposition to, or attempting to influence, any current policy of the Government of the United States, or any private group, association, or enterprise.

C. The VA's New Flag Manual.

The VA permits private parties to display -- at the discretion of VA officials -- a diverse variety of American and foreign flags in its 119 national cemeteries. (NFM ¶¶ 2c.-2f., 7.) The VA adopted the NFM (App. B.) after the district court issued its judgment in favor of Mr. Griffin.[1] The NFM, like its predecessor regulations (App. C.), places limitations on the display of Confederate flags *that are not imposed on the display of any other flags*. As shown below, the NFM is virtually devoid of (1) any standards that limit VA discretion to grant or deny permission to display a flag at a national cemetery; and (2) procedural safeguards that guarantee a prompt decision on a request to speak.

Organizational sponsor requirement. The NFM (App. B.) requires that the Confederate flag must be displayed by an approved organizational sponsor. (¶¶ 7a., 7c.) The manual (¶ 7c.) establishes a procedure for approval of an organizational sponsor, but provides no standards for granting such approval. Further, the VA may revoke an organization's authorization (¶ 2g.) for conduct, on or off VA property, "not in keeping with NCA's responsibilities to maintain the integrity and decorum of the cemetery."

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[1] The original flag manual ("FM") placed the same restrictions on display of the Confederate flag as the NFM. The FM, however, explicitly encouraged the privately sponsored, daily display of the Families POW/MIA flag ("POW Flag"). (*See* FM, App. C., ¶ 7a., b., c.) After the district court referred to ¶ 7a. in rejecting the VA's "time-place-manner" argument, 129 F.Supp.2d at 844, the VA eliminated the overt encouragement of the privately sponsored, daily display of the POW Flag. But the underlying differential treatment of the two flags, while now more subtly phrased, remains.

The two-day restriction. The NFM (¶ 7a., c.) restricts display of the Confederate flag to two days a year, Memorial Day and either Confederate Memorial Day or an alternative ceremonial day. Additional "one-time" displays will be "considered on an individual basis." (¶ 7d.) The NFM provides no standards under which the VA decides whether additional displays will be allowed. The NFM does provide, however (¶ 7d.), that the VA will respond to a request for one-time displays within 10 working days of receipt.

The deviation procedure. An individual seeking to display the Confederate flag on any occasion (normally an organizational sponsor is required) and an organization seeking to display the flag on more than the two permitted days may do so only by obtaining written permission from the VA for a "deviation" from normal VA policy. (¶ 2b.) A request for a deviation must go first to the cemetery director, who may deny the request if it is "not in keeping with NCA's mission," whatever that may mean. The director has no power to approve a deviation. Instead, if she does not deny the request she must forward it with a recommendation for approval to the Memorial Services Network ("MSN") Director, who in turn forwards the application for decision by the Deputy Under Secretary for Operations ("DUO").

The NFM does not provide standards under which the DUO is to make his or her decision, although the DUO's decision is final. (¶ 2b.) By contrast, the director (in the exercise of an unlimited discretion) may grant permission for the display of a non-Confederate flag on any of the 363 days when display of the Confederate flag is banned, although once again the NFM imposes no standards to guide the director's discretion. On such days, display of the Confederate flag would require a "deviation" under ¶ 2b.

The NFM provides that the cemetery director must forward the request for approval to the MSN Director at least fourteen (14) days before the proposed display and that the DUO must act on the request within five (5) business days of his receipt of the application. But the manual provides no time frame within which the MSN director must forward the request to the DUO. The MSN director thus could "sit on" a request for deviation indefinitely. The NFM provides no time constraints on VA officials to decide whether to permit display of a non-Confederate flag.

Size Limitation. Where Confederate dead are buried in individual graves, only "small individual Confederate grave flags may be placed...." (¶ 7 b.(1).) Although not applicable at Point Lookout, where Confederate dead are buried in a mass grave (¶ 7 b.(2).), this limitation applies wherever Confederates are interred in individual graves.

D. Criminal Penalties for Violation of § 1.218(a)(14) and Its Companion Regulations.

Those who engage in an "[u]nauthorized demonstration or service in a national cemetery or on other VA property" are subject to "a term of imprisonment of not more than six months" and a fine of $250.00. 38 C.F.R. § 1.218 (b), (b)(9). Section 1.218 (a)(14)(ii) defines a "demonstration" as including the display of a flag, an unauthorized "oration" or "partisan activities," including casual criticism of VA flag and speech restrictions.

E. The District Court Proceedings.

In August, 2000, the VA refused Mr. Griffin's request to display daily a full-sized, historically accurate Confederate flag from a separate flag pole at the Cemetery. The VA specifically cited its former flag manual and flag policy ("Flag Manual") as the basis of

the denial. (*See* Appendix C.) The Flag Manual (Appendix B.) was expressly based on §1.218(a)(14).

On September 21, 2000, Mr. Griffin filed a complaint in the United States District Court for the District of Maryland against the VA and two VA officials in their official capacities. Mr. Griffin invoked federal-question jurisdiction under 28 U.S.C. § 1331. Mr. Griffin alleged that the Flag Manual and § 1.218(a)(14) were unconstitutional, both on their face and as applied to him. On October 11, 2000, Mr. Griffin filed a motion for preliminary injunction, with supporting declarations and a request for judicial notice. In response, on November 3, 2000, defendants (referred to as "the VA") filed an opposition and a cross-motion for summary judgment, also with supporting declarations. On November 30, 2000, the district court heard extensive oral argument from counsel.

On January 29, 2001, the district court issued its ruling. The court consolidated trial on the merits with the hearing on the preliminary injunction, as permitted by FED. R. CIV. P. 65, and tried the case from the bench. *Griffin v. Dept. of Veterans Affairs*, 129 F.Supp.2d 832, 837 (D. Md. 2001). The district court refused to reach the merits of Mr. Griffin's facial challenge to § 1.218(a)(14) on the grounds that under 38 U.S.C. § 502, such a challenge must be brought in the Court of Appeals for the Federal Circuit. The court ruled that it had jurisdiction over Mr. Griffin's as-applied challenge to § 1.218(a)(14) and the predecessor regulations of the NFM.

The court held the VA's refusal to allow Mr. Griffin to display the flag unconstitutional. The court reasoned that Mr. Griffin's flag display was private speech that furthered the Cemetery's purpose of honoring the Confederate dead. The court noted that the VA failed to show that display of the flag would disrupt the Cemetery

and that the VA itself had flown the flag at the Cemetery from 1994 to 1998 without incident.

The Fourth Circuit reversed, *Griffin v. Dept. of Veterans Affairs*, 274 F.3d 818 (2001). The court held that the purpose of the Cemetery was to honor the Confederate dead "as Americans," a purpose with which the flag was purportedly inconsistent. The court also held that the Cemetery was government speech, which the flag garbled and distorted. Mr. Griffin has filed a petition for certiorari seeking review of this decision.

F. The Federal Circuit's Opinion.

On or about November 22, 2000, Mr. Griffin petitioned for review in the Federal Circuit.[2] Mr. Griffin argued that § 1.218(a)(14) violated the First Amendment because it lacked "narrow, objective and definite" substantive standards to guide official discretion in granting or deny permission to speak; and procedural safeguards that guaranteed a reasonably prompt decision on a request to speak. Mr. Griffin also challenged certain terms of § 1.218(a)(14) as unconstitutionally vague.

Mr. Griffin's petition was denied by a decision of April 30, 2002. *Griffin v. Secretary of Veterans Affairs*, 288 F.3d 1309, 2002 WL 826931 (Fed. Cir. 2002)(App. A). Before reaching the merits, the court held that it had jurisdiction and that a stay was unwarranted. The court further held that Mr. Griffin had standing

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[2] In response to motions by the VA to dismiss Mr. Griffin's petition for lack of jurisdiction, Mr. Griffin and co-petitioner Gregory S. Klemmer filed a second petition for review of § 1.218(a)(14), Case No. 01-7038. The two petitions were consolidated and treated as one case.

to challenge the constitutionality of the provisions of § 1.218(a)(14) that apply to expression other than the display of flags. A. 8-9.

Proceeding to the merits, the court assumed that § 1.218(a)(14) was a prior restraint on speech and that the VA's "power to grant selective exceptions" to § 1.218(a)(14)'s speech prohibitions "raises the same concerns" that have made similar "standardless licensing schemes vulnerable to an unbridled discretion challenge." A. 15.

The court twice recognized that § 1.218(a)(14) "sets no explicit standards to determine when a VA official may authorize or approve" a request to engage in expression within the scope of the regulation. 2002 WL 826931 at 6, 9; A. 14, 20-21.[3]

The court held that unbridled discretion was constitutional in the context of a national cemetery because of the nature of the forum. The court reasoned that no Supreme Court case, including *Board of Airport Comm. of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), "has suggested that [the unbridled discretion] doctrine is applicable outside the setting of a public forum," although it acknowledged that "several cases" from other circuits "have struck down standardless licensing schemes in nonpublic fora." *Id.* at 7-8, A. 18. The court rejected Mr. Griffin's argument that unbridled discretion is unacceptable in a nonpublic forum for the same reasons it is unacceptable in a public forum. The court also rejected the VA's argument that the applicable constitutional standard was the

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[3] At page 9 the court further states: "The text of § 1.218(a)(14) sets no explicit limits on the discretion of VA officials to permit exceptions [to §1.218(a)(14)'s ban on included forms of expression] and the government has given us little or no reason why this grant of discretion differs from those that have been struck down as unconstitutional in the past."

rational basis test, labeling both arguments as "extremes." *Id.* at 8, A. 18.

The court applied a test of "whether the discretionary power granted to VA officials by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries." *Id.* at 9, A. 21. The court identified three factors that in its view justified unlimited discretion. First, government officials should be given "greater latitude" in nonpublic fora because such fora are defined in terms of discretionary restrictions on permissible speech. A. 23.

Second, the VA is charged with maintaining national cemeteries as shrines to the nation's war dead. Third, National cemeteries are sites for government speech in the form of flag displays. These factors "heighten[] the discretion" the VA may exercise. A. 23-25. The court continued:

> Where, as here, the government seeks to project a certain image and atmosphere, it must be especially sensitive to concerns that private speech taking place in the same forum might be perceived by listeners as government speech, or might dilute the government's own message. The government therefore must exercise discretion and judgment to decide what speech is appropriate for national cemeteries.

2002 WL 826931 at 11; A. 25. Persons denied the right to speak, the court reasoned, could bring as-applied challenges based on allegations of unreasonableness or viewpoint discrimination. "But Mr. Griffin," the court reasoned, "has not convinced us that preserving the national cemetery for the government's own expressive purposes can be accomplished without vesting a significant degree of discretion in VA facility heads." The court

concluded that since "the judgments necessary to ensure that cemeteries remain 'sacred to the honor and memory of those interred and memorialized there,' may defy objective description and may vary with individual circumstances," the unlimited discretion conferred by § 1.218(a)(14) is reasonable. A. 26.

The court also held that Mr. Griffin had not demonstrated that "a real and substantial threat to expression flows from the alleged unbridled discretion vested in VA facility heads." A. 26-30. Even though Mr. Griffin's opportunity to "present evidence is limited if a facial challenge to VA regulations may be brought only before an appellate court," he had failed to allege that § 1.218(a)(14) chills speech anywhere other than national cemeteries. As to the cemeteries, the court cited the VA's former and new flag manuals as imposing a "clear and unwavering" policy that "has left little room for arbitrary or discriminatory enforcement by individual cemetery officials." The court admitted, however, that the flag manuals "do grant facility heads discretion to permit flag displays "for special occasions." If this is all the discretion afforded, reasoned the court, it is not unconstitutional.

Outside the area of flag display, the court continued, Mr. Griffin's allegations were flimsy hypotheticals about what might happen if, for example, Mr. Griffin made a remark about VA flag policy (arguably a "partisan statement") or gave an unauthorized "oration" to a small group of people. The mere "theoretical possibility" of such speech suppression was inadequate in the court's view. A. 28-29.

The court rejected Mr. Griffin's argument that procedural safeguards were necessary for two main reasons. First, the requirement of safeguards "comes into play primarily 'when a State undertakes to shield the public from certain expression it has labeled offensive.'" The court cited this Court's recent decision in *Thomas*

v. Chicago Park District, 534 U.S. 316 (2002), as authority. The court apparently viewed § 1.218(a)(14) as content-neutral. 2002 WL 826931 at 13-14; A. 30-31.

Second, the court reasoned, no case demands such safeguards in a nonpublic forum. And "Griffin has not shown that imposing additional procedural requirements on the VA's decision-making process would materially... increas[e] expression," or that the lack of procedural safeguards chills any speech. 2002 WL 826931 at 15; A. 31-32.

The court concluded by rejecting Mr. Griffin's vagueness challenges. 2002 WL 826931 at 15-16; A. 33-36. The court reasoned that (1) Mr. Griffin lacked standing to raise a vagueness challenge because he had not alleged that he had been injured by the vague provisions; (2) Mr. Griffin failed to show a "real and substantial threat" to First Amendment rights posed by the regulations; and (3) the terms "demonstration," "oration" and "partisan activity" were sufficiently definite to pass facial constitutional muster.

The dissent agreed with the majority's rejection of Mr. Griffin's facial challenge with respect to flag display. In regard to vagueness, however, the dissent found § 1.218(a)(14) "grossly overbroad." *Id.* at 17. The dissent argued that Mr. Griffin's facial challenge should not be considered outside the scope of flag display because Mr. Griffin did not mention non-flag speech in his demand letter to the VA and therefore had not exhausted his administrative remedies. The dissent viewed the overbreadth doctrine as insufficient to support an attack on the non-flag provisions of § 1.218(a)(14).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER UNBRIDLED DISCRETION IS UNCONSTITUTIONAL IN A NONPUBLIC FORUM.

In *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 755-756 (1988), the Court explained the dangers of unbridled official discretion to permit or deny the right to speak. While the Court's focus was on the necessity of challenging the constitutionality of such laws facially, its discussion of the evils of unbridled discretion is relevant to whether unbridled discretion is permissible in a nonpublic forum. The Court recognized two "identifiable risks to free expression" caused by a law that confers unbridled discretion:

> First, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.

Quoting from *Thornhill v. Alabama*, 310 U.S. 88, 97 (1965), the Court reasoned that:

> 'It is not merely the sporadic abuse of power by the censor *but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.*'
> *Id.* at 757. (Italics in original.)

"Only standards limiting the licensor's discretion," the Court concluded, "will eliminate this danger by adding an element of certainty fatal to self-censorship." *Lakewood* at 757-758.

> Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.... In sum, without standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of 'as applied' challenges render the licensor's action in large measure unreviewable.

Id. at 758-759.

The twin dangers of self-censorship and unreviewable decisions are just as unacceptable in a nonpublic forum as they are in a public forum. Speech restrictions in a nonpublic forum must be "reasonable in light of the purpose of the forum and all the surrounding circumstances," *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 809 (1985), and viewpoint-neutral. *Id.* at 806.

The danger posed by censorship, including self-censorship, is viewpoint discrimination. *See R.A.V v. City of St. Paul*, 505 U.S. 377, 430 (1992)(Stevens, J., Concurring)("Viewpoint discrimination is censorship in its purest form."). A public official with unbridled discretion is able to discriminate against any viewpoints he or she does not like. Viewpoint discrimination thus

is "'inherent in [the] very existence'" of unlimited discretion. *Lakewood* at 757 (italics omitted).

The same is true of unreasonableness. Even if the actual reason for denying the right to speak were unreasonable (*e.g.* an official's personal dislike of the speaker), the official could hide the true basis for refusing permission to speak behind a broad discretion. Unreasonableness thus is also "inherent in [the] very existence"of unlimited discretion. To tolerate unlimited official discretion over the right to speak in a nonpublic forum thus is to tolerate, and indeed invite, the unreasonableness and viewpoint discrimination forbidden by the First Amendment.[4]

The Federal Circuit holds that the unlimited discretion conferred by § 1.218(a)(14) is "reasonable in light of the characteristic nature and function of national cemeteries," 2002 WL 826931 at 11; A. 26. But as shown above, unlimited discretion opens the door to unreasonableness and viewpoint discrimination.

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[4] The court accused Mr. Griffin, 2002 WL 826931 at 8, A. 18, of advocating that the court "ignore the forum doctrine." Nothing could be farther from the truth. Mr. Griffin simply argued that in a nonpublic forum, unlimited discretion is inconsistent with the requirements of reasonableness and viewpoint neutrality. Far from asking the court to ignore the standards applicable to a nonpublic forum, Mr. Griffin argued that the § 1.218(a)(14) was unconstitutional precisely because it allowed VA officials to violate those standards. The court accurately described Mr. Griffin's position, however, *id.*, when it stated that he urged the court to "adopt a *per se* rule that every grant of unbridled discretion is facially unconstitutional." That is exactly Mr. Griffin's position, but it is not based on "ignoring" forum doctrine. Rather it is based on the obvious truth that *unlimited* discretion is *always* inconsistent with reasonableness and viewpoint neutrality.

The Federal Circuit's holding thus implies that a "reasonable" amount of viewpoint discrimination or unreasonable speech suppression is acceptable in a nonpublic forum. According to *Cornelius* and many other decisions of this Court, however, viewpoint discrimination and unreasonable restrictions on speech are *never* tolerable in a nonpublic forum.

Further, contrary to the Federal Circuit's reasoning, the Court has indeed suggested that overly broad official discretion in a nonpublic forum violates the First Amendment. In *Board of Airport Comm. of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987), the Court held unconstitutional an ordinance that prohibited all "First Amendment activities" within the central terminal of Los Angeles airport. In an effort to narrow the ordinance, the airport authorities argued that the ordinance was "intended to reach only expressive activity unrelated to airport-related purposes." The Court held that even as narrowed, the ordinance still violated the First Amendment:

> Such a limiting construction... is of little assistance in substantially reducing the overbreadth of the resolution. Much nondisruptive speech--such as the wearing of a T-shirt or button that contains a political message--may not be "airport related," but is still protected speech even in a nonpublic forum. *See Cohen v. California*, 403 U.S. 15 (1971). Moreover, the vagueness of this suggested construction itself presents serious constitutional difficulty. The line between airport-related speech and nonairport-related speech is, at best, murky.... In essence, the result of this vague limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that "confers on police a virtually unrestrained power to arrest and charge persons with a violation" of the

> resolution is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Id.* at 576, quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135-136 (1974) (POWELL, J., concurring) (Other citations omitted).

The Court's concern over giving public officials "virtually unrestrained power to arrest and charge" speakers and the "opportunity for abuse" that goes with it is very close to the rationale of *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). The underlying concern of both is the potential for officials to misuse overly broad powers to punish or prohibit speech for improper reasons. *Jews for Jesus* thus does indeed suggest that *Shuttlesworth* applies in a nonpublic forum.[5]

As the Federal Circuit recognized, in "several cases" other circuits have "struck down standardless licensing schemes in nonpublic fora." In *Lewis v. Wilson*, 253 F.3d 1077, 1080-1081 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 1536 (2002) the court effectively assumed that a license plate was a nonpublic forum, *id.* at 1079, by reasoning that the challenged statute regulating issuance of vanity license plates was unconstitutional regardless of the type of forum a license plate represents. Citing *Lakewood*, 486 U.S. at 764 (newsracks), *Cox v. Louisiana*, 379 U.S. 536, 556 (1965) (parades) and *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992)(same), all of which dealt with speech in a public forum, the court held that the statute, which

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[5] Oddly, the Federal Circuit noted *Jews for Jesus*, 2002 WL 826931 at 7, but cited only pages 574 and 575 of the opinion. The court ignored page 576, where the Court considered the airport authorities' narrowing construction.

allowed state officials to refuse to issue a plate bearing a message "contrary to public policy" violated the First Amendment.

In *DeBoer v. Village of Oak Park*, 267 F.3d 558, 573 (7th Cir. 2001), the court applied the *Shuttlesworth* principle in the context of a meeting room in the local "village hall." *Id.* at 561. The village hall proved to be so popular a site for group meetings that the village, suffering from upkeep costs and other interference with local governmental operations, *id.*, adopted a use policy designed to restrict use of the hall. The village's use policy required, among other things, that any civic program conducted at the village hall must "benefit[] the public as a whole." The court assumed that the village hall was subject to the standards applicable to speech regulations in a nonpublic forum. *Id.* at 566-567. Citing *Shuttlesworth* and *Lakewood*, the court held the "benefits-the-public-as-a-whole" requirement unconstitutional on its face. *Id.*

In *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1199, n. 11 (11th Cir. 1991), *rehearing denied*, 947 F.2d 1492 (11th Cir. 1992) the issue was the constitutionality of state restrictions on the placement of newsracks at public rest areas. The court held that the rest areas were a nonpublic forum, *id.* at 1205, and that the state statute restricting the placement of newsracks in such areas violated the First Amendment because it lacked definite substantive standards to guide the responsible state official's discretion. The court held that *Shuttlesworth* applies in a nonpublic forum:

> Our holding *infra* that rest areas along the interstate system are nonpublic fora does not eliminate the constitutional requirement of standards for discretionary licensing. It may, however, require that any regulations or standards promulgated by the DBS or other agencies

> be reviewed only for reasonableness instead of some higher level of scrutiny.

Id. at 1199 n. 11 (citation omitted). *See also New York News, Inc. v. Metropolitan Transp. Auth.*, 753 F.Supp. 133, 140 (applying *Shuttlesworth* to sale of newspapers in train and subway stations); *Warner v. City of Boca Raton*, 64 F.Supp.2d 1272, 1292 (S.D. Fla. 1999), question certified, 267 F.3d 1223 (11th Cir. 2001)(applying *Shuttlesworth* rule in cemetery).

In *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation,* 277 F.3d 1322, 1329-1330 (11th Cir. 2002), the court applied the *Shuttlesworth* rule against unlimited official discretion to invalidate an ordinance regulating the use of newsracks in an airport, which is also a nonpublic forum. *Id.* at 1326. The court cited *Lakewood* for the principle that a grant of unbridled discretion to public officials on its face violates the First Amendment. The Federal Circuit's holding that in a national cemetery, the exercise of unbridled discretion is conflicts with these decisions.

The Federal Circuit's core reasons were that a national cemetery is a nonpublic forum dedicated to an important commemorative purpose, where the government itself engages in speech.[6] Each of these factors, the court reasoned, heightens the amount of discretion that VA officials may reasonably exercise. *See* 2002 WL 826931 at 8-11; A. 18-26.

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[6] The VA argued virtually none of the court's rationale, contending instead that § 1.218(a)(14) should be upheld because the standard of review was the rational basis test.

The court's rationale is flawed for at least three reasons. First, it is unsupported by any case authority. Certainly this Court has never suggested that the *Shuttlesworth* principle or the closely related principles against vagueness and unrestrained official power to punish speech are inapplicable in a nonpublic forum. As discussed above, *Jews for Jesus* strongly suggests that *Shuttlesworth* is applicable in a nonpublic forum.

Second, while the court's logic supports *a measure of VA discretion* in order to preserve the nature of the forum, it does not support *unlimited discretion*. In other words, even if one were to grant that because of the "special nature" of a national cemetery, the VA should be allowed a reasonable amount of discretion to restrict speech, it does not follow that the VA must exercise *unlimited* discretion. As discussed above, an official with unlimited discretion can act unreasonably and discriminate against disfavored viewpoints, both of which are *always* intolerable in a nonpublic forum.

Third, the court establishes a rule that unlimited discretion is appropriate in some nonpublic fora but not others.[7] The line between the two groups of fora is impossible to draw. Every nonpublic forum has special attributes that justify the restriction of speech that would be acceptable in another place. For example, one of the arguments made in support of the "contrary-to-public-policy" restriction on license-plate messages in *Lewis* was that the display of offensive messages on license plates could lead to "road

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[7] Neither the Federal Circuit nor anyone else has suggested that unlimited discretion is always appropriate in a nonpublic forum. The court rejects what it calls Mr. Griffin's "extreme[]" position that such discretion is always unconstitutional regardless of the type of forum. The only remaining possibility is that unlimited discretion is appropriate in some nonpublic fora, but not in others.

rage... creating a traffic hazard." *Id.* 253 F.3d at 1080-1081. This danger includes the potential for fatalities. Without in any way denigrating the importance of maintaining national cemeteries as shrines to the nation's war dead (a goal Mr. Griffin seeks to promote), one can certainly argue that it is no more important than preventing serious injury or death on the highways. Similarly, in a case such as *Sentinel Communications*, one could argue that maintaining the tranquility of highway rest stops helps prevent fatigued drivers from being killed in accidents. In a case like *De Boer*, 267 F.3d at 561, one could argue that the village's use policy was justified by the need for local government to function without the disruptions caused by private group meetings. The same reasoning that the Federal Circuit uses to show that a national cemetery is "special" enough to permit unbridled VA discretion thus can be used to justify such discretion in virtually any nonpublic forum.

The logical result of the Federal Circuit's approach is to make unlimited discretion constitutional in almost all nonpublic fora. Such a result, however, would effectively eliminate the reasonableness and viewpoint-neutrality requirements, since unlimited discretion invariably opens the door to unreasonable restrictions and viewpoint discrimination. The only workable alternative to this result would be to adopt a *per se* rule that unlimited official discretion is *always* unconstitutional in a nonpublic forum. This alternative is the only workable rule and it is the rule Mr. Griffin urged below and urges this Court to make explicit.

The Federal Circuit suggests, 2002 WL 826931 at 12, A. 27-29, that the NFM and its predecessor regulations have "constrained" the VA's discretion with respect to flag displays since 1995 and thus brought additional clarity to § 1.218(a)(14). But these regulations provide no curbs on the VA's discretion in regard to non-flag expression. Further, even in regard to flags, neither the

NFM nor its predecessors place any meaningful limitations on the VA's discretion. The NFM (App. B) recognizes five flags authorized for public display in national cemeteries (¶ 2c.), but provides ***no standards*** with respect to when such flags may be displayed. Paragraph ¶ 2d. of the NFM provides:

> Certain other flags, pennants and guidon banners may be displayed at the discretion of the Cemetery Director for special occasions as long as they commemorate honorable military service and are not intended to promote any particular viewpoint or ideology other than the wish to commemorate military service.

This provision gives VA officials unlimited discretion to prohibit flag displays by deciding that (1) the occasion is not "special," or (2) regardless of any other consideration, the person wishing to display the flag intends to use it to promote some "viewpoint or ideology." In other words, VA officials are permitted to "scan and interpret [flag displays] to discern their underlying philosophic assumptions...." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 845 (1995), which is blatant viewpoint discrimination, *id.*; *DeBoer*, 267 F.3d at 571-572.

In regard to the display of Confederate flags, the NFM repeatedly confers unlimited discretion on VA officials. Display of the Confederate flag requires an organizational sponsor (NFM ¶ 7c.), and is limited to a single sponsor (¶ 7a.). The VA has unlimited discretion to approve such a sponsor. Once the sponsor is selected, moreover, its right to display the flag may be revoked for "conduct not in keeping with [the National Cemetery Administration's] responsibilities to maintain the integrity or decorum of the cemetery...." (¶ 2g.) Nothing requires that the offending "conduct" occur at a VA cemetery itself. A group that sues or criticizes the VA off VA property (criticizing the VA on VA property could land

the critic in federal prison) therefore could find that its authorization had been revoked. *See Atlanta Constitution*, 277 F.3d at 1329 (discretion to cancel right to sell publications in newsracks to promote "diversity of viewpoints"conferred unconstitutional discretion).

Any individual seeking to display the Confederate flag on days other than the two authorized days each year would have to apply for written permission for a "deviation" from VA policy under NFM ¶ 2b. The NFM again provides *no standards whatsoever* to guide official discretion in deciding whether to approve a deviation request. Perhaps the VA would use the "standard" of whether the request is "in keeping with NCA's mission," but that "mission" is not defined. The "mission" thus can be anything VA officials need to deny the right to display a disfavored flag. Fairly construed, the NFM thus provides no meaningful restrictions on VA discretion. The discretion the Federal Circuit approves therefore is *unlimited* discretion. The Court should grant review to settle the law that the *Shuttlesworth* requirement of "narrow, objective and definite" standards applies in a nonpublic forum.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER A CONTENT-BASED SPEECH REGULATION IN A NONPUBLIC FORUM MUST INCLUDE PROCEDURAL SAFEGUARDS THAT GUARANTEE A PROMPT DECISION ON A REQUEST TO SPEAK.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Court recognized that the absence of procedural safeguards creates the same risks to free speech as unbridled official discretion:

> The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating excessive administrative discretion,"... Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.

Id. at 226-227, *citing Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965).

In spite of the above pronouncements by the Court (and the undisputed 64- and 72-day delays by the VA in responding to Mr. Griffin's two requests to display the flag), the Federal Circuit held that the procedural-safeguards requirement "has little relevance to the present case." 2002 WL 826931 at 14; A. 31. Procedural safeguards, however, are as necessary in a nonpublic as in a public forum. As discussed above, the very existence of unlimited official discretion is incompatible with the standards of reasonableness and viewpoint neutrality applicable in a nonpublic forum. As *FW/PBS* makes clear, the lack of procedural safeguards has the same effect as unlimited official discretion. A lack of procedural safeguards, like unlimited discretion, thus is incompatible with the constitutional standards for speech regulation applicable in a nonpublic forum.

The Federal Circuit, 2002 WL 826931at 14, A. 31, cited *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775 (2002) as authority supporting its rejection of Mr. Griffin's facial challenge. *Thomas*, however, involved a content-neutral ordinance, *id.*, 122 S.Ct. at 779, that required the city to respond to a request to speak within 28 days. *Id.* at 781. Section 1.218(a)(14), is not

content-neutral. Section 1.218(a)(14)(ii) criminalizes "commentary or actions in support of, or in opposition to, or attempting to influence any current policy of the Government of the United States or any private group, association or enterprise." Thus a critic of VA policy or corporate philanthropy goes to federal prison, but a critic of state or local government does not. This prohibition is clearly content- and indeed viewpoint-based.

Further, § 1.218(a)(14) imposes no time limits. With respect to speech other than the display of flags, there simply are no time restrictions on VA decision-making. The NFM, with which the court tries to prop up § 1.218(a)(14) in regard to flag displays, provides no time limit for responding to a request to display a non-Confederate flag. In regard to the display of Confederate flags, an individual seeking to display the Confederate flag at any time and an organization seeking to display it more than two days a year would have to obtain written permission for a deviation from the VA. The NFM (¶ 2b.) imposes some time limits, but also creates a "gap" that allows the MSN Director to sit on an application for a deviation indefinitely. The VA's speech restrictions thus are far from the benign arrangement upheld in *Thomas*.

The Federal Circuit stated that it did not "believe a real and substantial threat to expression flows from the alleged unbridled discretion" conferred by § 1.218(a)(14). 2002 WL 826931 at 12; *see also id.* at 15. The short answer to these doubts is the dissent's characterization of § 1.218(a)(14):

> Section 1.218(a)(14) of the VA regulations appears to be grossly overbroad. Indeed, it reads like a law school examination question in which law students are invited to find the maximum number of serious constitutional issues raised by a hypothetical ordinance. By barring unauthorized "partisan

activities," defined as "those involving commentary or actions in support of, or in opposition to, or attempting to influence, any current policy of the Government of the United States, or any private group, association, or enterprise," 38 C.F.R. § 1.218(a)(14)(ii) (2001), the regulation appears to bar political discussions by patients at a VA hospital or by employees at the VA headquarters building, even though such activities are constitutionally protected. It bars the unauthorized use of "coarse" or "abusive" language, even though the Supreme Court has held such terminology in statutes to be unconstitutionally vague. It appears to bar unauthorized "picketing" or orations on sidewalks that are part of VA facilities, even though such conduct is protected. If we were compelled by the overbreadth doctrine to consider the facial constitutionality of this regulation in all contexts, I would likely find it unconstitutional because it is substantially overbroad.[8]

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[8] The majority stated, 2002 WL 826931 at 5, n. 7, that "if the dissent is correct in its assessment that § 1.218(a)(14) is 'grossly overbroad,' the regulation would be struck down without reference to the type of speech Mr. Griffin would engage in," *citing Jews for Jesus*, 482 U.S. at 574-575. Despite this suggestion that the majority disagrees with Judge Dyk's assessment of § 1.218(a)(14), nothing in the majority opinion suggests that Judge Dyk is wrong. The majority acknowledges that there is nothing to distinguish § 1.218(a)(14) from other standardless schemes that have been held unconstitutional. If one combines the dissent's view of § 1.218(a)(14) on the merits with the majority's view of standing, the result is that Mr. Griffin's petition is granted.

2002 WL 826931 at 17 (citations omitted). Section 1.218(a)(14) thus shows ***on its face*** that it reaches an enormous amount of speech. In *Jews for Jesus*, 482 U.S. at 574, the Court looked to the face of the challenged ordinance to determine whether it "significantly compromise[d] recognized First Amendment protections...." No more should be required of Mr. Griffin since the sweep of § 1.218(a)(14) is only too obvious on the face of the regulation.[9]

It bears repeating that § 1.218(b) and (b)(9) impose criminal penalties for saying the wrong words on VA property, including arrest, a $250 fine and up to six months in federal prison. "[A] law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft v. Free Speech Coalition*, ___ U.S. ___, 122 S.Ct. 1389, 1398 (2002). "[E]ven minor punishments can chill protected speech...." *Id.* Merely saying, "It's wrong for the VA not to let us fly our flag in this cemetery," a statement made at virtually every Confederate memorial gathering, would be a "commentary... in opposition to" a government policy, which would subject the speaker to a personally devastating period of incarceration. Speakers should not have to

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[9] The Federal Circuit suggested that Mr. Griffin had to produce evidence showing that § 1.218(a)(14) reaches a substantial amount of speech. Section 1.218(a)(14), however, is a "prior restraint" that denies access to a forum before speech occurs. Prior restraints, while not unconstitutional *per se*, bear a "heavy presumption" against their constitutionality. *FW/PBS*, 493 U.S. at 225; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). The government, not Mr. Griffin, "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 558 (1976).

await arrest to challenge a law that directly threatens so much speech in so many locations and in such a brutal fashion.[10]

CONCLUSION

For the reasons set forth above, this petition should be granted.

Respectfully Submitted,

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June 3, 2002

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[10] For memorial-service speeches criticizing VA policies, *see* http://members.tripod.com/~PLPOW/ . Click on "Rick Griffin 2001 Cemetery Speech" and "Father Anderson 2000 Cemetery Speech" at left. Fr. Anderson's comments on the VA's flag policy are in bold near the end of his address. By the terms of § 1.218(a)(14), (b) and (b)(9), both Mr. Griffin and Fr. Anderson (an ordained priest) could have been arrested and put in federal prison for six months, for the crime of criticizing VA policy.

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VA Manual, "Flags in VA Cemeteries," April 21, 1995 and 1998 statement of policy on Confederate flags C1

PATRICK J. GRIFFIN, III and GREGORY S. CLEMMER, Petitioners,

v.

SECRETARY OF VETERANS AFFAIRS, Respondent.

01-7026, 01-7038

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

April 30, 2002, Decided

OPINION:

CLEVENGER, Circuit Judge.

Petitioners bring a constitutional challenge to the validity of 38 C.F.R. § 1.218(a)(14) under the jurisdiction of this court to review rulemaking by the Department of Veterans Affairs. Section 1.218(a)(14) governs the conduct of visitors on property under the charge and control of the Department of Veterans Affairs, including national cemeteries administered by the National Cemetery Administration. Petitioners charge that the regulation on its face violates the First Amendment to the United States Constitution because it vests unbridled discretion to suppress speech in the hands of government officials, because it lacks procedural safeguards to ensure that decisions permitting or denying speech are made promptly, and because the regulation is unconstitutionally vague. We hold that 38 C.F.R. § 1.218(a)(14) does not on its face violate the First

Amendment, and deny the petition to invalidate the regulation.

BACKGROUND

Petitioners Patrick J. Griffin, III, and Gregory S. Clemmer (together, "Griffin") are, respectively, a former "Commander-in-Chief" and a former "Historian-in-Chief" of the Sons of Confederate Veterans, an organization dedicated to preserving the history and legacy of soldiers who fought for the Confederacy in the Civil War. Respondent is the Secretary of Veterans Affairs. The Department of Veterans Affairs ("VA"), through its National Cemetery Administration ("NCA"), is responsible for administering 119 national cemeteries in 39 states and Puerto Rico. National cemeteries provide burial for veterans of the Armed Forces, their spouses and minor dependents, and certain veterans of the reserves, Coast Guard, Public Health Service, and the wartime Merchant Marine. n1 The VA also maintains medical centers, outpatient clinics, veterans' centers, and regional offices for benefits administration throughout the country.

> n1 Other military cemeteries in the United States are maintained by the Army (e.g., Arlington National Cemetery), by individual states and, in a few cases, by the Department of the Interior.

The roots of this case lie in a dispute between Griffin and the VA over the display of the Confederate flag at Point Lookout Cemetery in Maryland, a national cemetery administered by the VA where there are buried approximately 3,300 Confederate soldiers who died while imprisoned at the Union prison camp at Point Lookout

during the Civil War. The United States flag, of course, is flown daily at Point Lookout as it is at all national cemeteries. Display of the National League of Families POW/MIA flag on designated days is mandated by statute (36 U.S.C. § 902), and all national cemeteries that are staffed daily currently fly the POW/MIA flag each day. n2 From 1994 to 1998, a Confederate flag flew daily at Point Lookout, allegedly on the unauthorized personal initiative of a VA employee. In 1998, a party unrelated to Griffin or the Sons of Confederate Veterans complained to the VA that only a Confederate flag should fly at Point Lookout, and not the United States flag. n3 In response to this complaint, the VA discontinued the display of the Confederate flag at Point Lookout.

> n2 At the time Mr. Griffin lodged his initial complaint, it appears that display of the POW/MIA flag on days other than those designated by statute was at the initiative of local interest groups. No evidence indicates that VA administrators were permitted to deny local interest groups permission to fly the POW/MIA flag daily.

> n3 The Sons of Confederate Veterans state that they do not share this view.

At the time Mr. Griffin filed his complaint, display of flags in national cemeteries was governed by National Cemetery System n4 Handbook 3220, issued on April 21, 1995 ("the Flag Manual"). The Flag Manual permitted display of Confederate flags at national cemeteries on only two days of the year: Memorial Day and Confederate Memorial Day (in states where Confederate Memorial Day is observed). The Flag Manual limited Confederate flag display to small flags on individual graves, and required the

Confederate flag to be subordinate to the United States flag in size and prominence.

n4 The precursor of the NCA.

The Flag Manual was promulgated under 38 C.F.R. § 1.218(a)(14). Section 1.218, itself promulgated under 38 U.S.C. § 218(a) (now 38 U.S.C. § 901), was issued in 1985 and sets forth security and law enforcement regulations applicable at all VA facilities and property not administered by the General Services Administration. Section 1.218(a)(14)(i) prohibits any service, ceremony, or demonstration on VA property, unless authorized by the head of the facility, while section 1.218(a)(14)(ii) places the display of unauthorized flags in the category of forbidden demonstrations:

> (i) All visitors are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited. Jogging, bicycling, sledding and other forms of physical recreation on cemetery grounds is prohibited.
>
> (ii) For the purpose of the prohibition expressed in this paragraph, unauthorized demonstrations or services shall be defined as, but not limited to, picketing, or similar conduct on VA property; any oration or similar conduct to assembled groups of people, unless the oration is part of an authorized service; the display of any placards, banners, or foreign flags on VA

> property unless approved by the head of the facility or designee; disorderly conduct such as fighting, threatening, violent, or tumultuous behavior, unreasonable noise or coarse utterance, gesture or display or the use of abusive language to any person present; and partisan activities, i.e., those involving commentary or actions in support of, or in opposition to, or attempting to influence, any current policy of the Government of the United States, or any private group, association, or enterprise.

38 C.F.R. § 1.218(a)(14) (2001).

After the VA discontinued daily display of the Confederate flag at Point Lookout, Griffin's attorney wrote to the VA, demanding that the VA permit the Sons of Confederate Veterans to display a Confederate flag at Point Lookout every day. When the VA refused permission for a daily display, Mr. Griffin filed suit against the VA in the District Court for the District of Maryland. The complaint alleged that the VA's Flag Manual and Flag Policy, as well as 38 C.F.R. § 1.218(a)(14), violated the First Amendment both on their face and as applied to Mr. Griffin's request for a daily flag display.

The district court agreed with Griffin that the VA's Flag Manual and Flag Policy, as applied to Griffin's request to fly a Confederate flag daily at Point Lookout, violated the First Amendment. *See Griffin v. Dep't of Veterans Affairs*, 129 F. Supp. 2d 832 (D. Md. 2001). The district court classified Point Lookout Cemetery as a nonpublic forum, meaning that restrictions on speech imposed by the VA at Point Lookout would be upheld provided they were reasonable and

viewpoint neutral. *Id.* at 840. Nonetheless, rejecting the government's argument that flag displays at Point Lookout should be treated as government speech rather than private speech on government property, the district court ruled that the VA's refusal was unreasonable and viewpoint discriminatory. According to the district court, the fact that a Confederate flag had flown at Point Lookout without controversy from 1994 to 1998 belied concerns that Confederate flags might create controversy or disrupt the tranquility and dignity of the cemetery. *Id.* at 841. Moreover, the district court believed that the VA's decision to exclude the Confederate flag reflected a conviction that the Confederate flag symbolizes racial intolerance and divisiveness, making the decision to exclude the flag an impermissible exercise of viewpoint discrimination. *Id.* at 843-44. As a consequence of the district court's decision that application of the VA's flag policies to Mr. Griffin violated the First Amendment, the VA revised its flag regulations to permit a Confederate flag to be flown daily at Point Lookout Cemetery, but not at any other VA facility. See Flags in VA National Cemeteries, NCA Directive 3220 (April 30, 2001).

However, the district court held that it lacked jurisdiction to consider Griffin's facial challenge to 38 C.F.R. § 1.218(a)(14). The district court noted that 38 U.S.C. § 502 vests the Court of Appeals for the Federal Circuit with exclusive jurisdiction to review any action of the Secretary for Veterans Affairs that is subject to the public notice or notice-and-comment requirements of the Administrative Procedure Act (5 U.S.C. § § 552(a)(1) and 553). Concluding that a challenge to 38 C.F.R. § 1.218(a)(14) fell under 38 U.S.C. § 502, because rulemaking is covered by section 552(a)(1) of the Administrative Procedure Act, the district court therefore held that exclusive jurisdiction over a facial challenge to the constitutionality of 38 C.F.R. § 1.218(a)(14)

rested with this court. *Id.* at 837-38. Despite having prevailed on his as-applied challenge, thereby winning the right to display the Confederate flag daily at Point Lookout, Mr. Griffin proceeded to file a petition in this court seeking invalidation of 38 C.F.R. § 1.218(a)(14) on the grounds that the regulation violates the First Amendment on its face.

After Mr. Griffin's facial challenge was argued to this court, the Court of Appeals for the Fourth Circuit reversed the District Court for the District of Maryland on Mr. Griffin's as-applied challenge. *Griffin v. Dep't of Veterans Affairs,* 274 F.3d 818 (4th Cir. 2001). Agreeing with the district court that Point Lookout was a nonpublic forum, the Fourth Circuit took more seriously the VA's concern that the VA's own "message" at Point Lookout might be garbled or distorted if private groups were allowed to display their own flags. *Id.* at 822-23. The Fourth Circuit therefore held that the VA's decision to deny permission for a daily Confederate flag display was reasonable, since the purpose of Point Lookout was to honor the soldiers buried there as Americans, not as Confederates. *Id.* Moreover, the VA might reasonably believe that acceding to Mr. Griffin's request would provoke similar requests from other groups and invite partisan conflict into the cemetery. *Id.* at 823. Finally, the Fourth Circuit held that Confederate flag display, far from being discriminated against, was actually treated more favorably than other private flag displays, since the VA's flag policy allowed private groups to display the Confederate flag two days a year without seeking special permission--a privilege not accorded to any other flag except those flags whose display is mandated by statute. *Id. at 824.* Accordingly, the Fourth Circuit held that the decision to deny Mr. Griffin's request for a daily Confederate flag display at Point Lookout was reasonable and viewpoint-

neutral, thereby satisfying the requirements of the First Amendment in a nonpublic forum.

I

Pursuant to 38 U.S.C. § 502, we have jurisdiction to review both the rulemaking process and the challenged rules of the VA, that jurisdiction extending to amendment, revision or repeal of the VA's rules as well. *Disabled Am. Veterans v. Gober,* 234 F.3d 682, 688 (Fed. Cir. 2000). Under 38 U.S.C. § 502, our review is in accordance with Chapter 7 of the Administrative Procedure Act, which directs the reviewing court to hold unlawful and set aside any agency action contrary to constitutional right, power, privilege or immunity, and any agency action unlawfully withheld. 5 U.S.C. § 706(2)(B) (2000). In this case, both the NCA's Deputy Under Secretary for Operations and the VA's General Counsel denied in writing Griffin's request for waiver or amendment of 38 C.F.R. § 1.218(a)(14). To the extent those actions were properly authorized, we are presented with an agency action denying Griffin's request. n5 If those actions lacked proper authority, a matter not raised by the parties, the failure of the agency to act on Griffin's request would constitute an agency action unlawfully withheld, assuming the regulation was in fact unconstitutional.

> n5 The record reflects that the General Counsel's written denial was "cleared for signature," and the government's brief asserts that "the VA denied" Mr. Griffin's request.

The constitutionality of a statute is an issue of law, *Demko v. United States,* 216 F.3d 1049, 1052 (Fed. Cir. 2000), and we likewise review the constitutionality of an

agency regulation without deference to the agency. However, while prior restraints are presumed invalid, facial challenges to speech restrictions are generally disfavored and petitioner faces a heavy burden in advancing his claim. *See Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 580, 141 L. Ed. 2d 500, 118 S. Ct. 2168 (1998). To prevail, Mr. Griffin must demonstrate that application of section 1.218(a)(14) poses a real and substantial threat of the alleged censorship risks. *See id.*; *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 759, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988).

As an initial matter, the VA asks us to stay our consideration of this case pending the final resolution of Mr. Griffin's as-applied challenge. We decline to do so. There is no logic to the VA's suggestion that this action would suffer a collateral estoppel effect from Griffin's as-applied challenge. Despite the government's stubborn refusal at oral argument to recognize the plain allegations of Mr. Griffin's petition, this case presents a facial challenge to the discretion granted to VA administrators by 38 C.F.R. § 1.218(a)(14). "Facial attacks on the discretion granted to a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 133 n.10, 120 L. Ed. 2d 101, 112 S. Ct. 2395 (1992). Whether or not Mr. Griffin has a constitutional right to display a Confederate flag daily at Point Lookout Cemetery has very little bearing on whether section 1.218(a)(14) violates the First Amendment on its face. As we explain below, we conclude that Mr. Griffin has standing to mount a facial challenge against section 1.218(a)(14) regardless of whether his right to display a flag at Point Lookout would be protected or not. Moreover, the Maryland district court concluded that the VA's decision to deny Mr. Griffin's request was rooted primarily in its Flag

Manual, and not in 38 C.F.R. § 1.218(a)(14). *See Griffin,* 129 F. Supp. 2d at 838. Mr. Griffin here limits his facial challenge to 38 C.F.R. § 1.218(a)(14). Accordingly, there is no reason to condition adjudication of Mr. Griffin's facial challenge on the outcome of his as-applied claim.

Mr. Griffin presses his challenge to section 1.218(a)(14)'s validity under three separate theories. First, Mr. Griffin alleges that section 1.218(a)(14) gives VA officials unbridled discretion to prohibit any kind of speech on VA property, and is therefore unconstitutional under the well-established First Amendment prohibition against standardless licensing schemes. Second, Mr. Griffin argues that section 1.218(a)(14) fails the First Amendment requirement for procedural safeguards in a licensing scheme, because section 1.218(a)(14) provides no time limit in which a VA official must grant or deny an individual's request to speak on VA property. Third, Mr. Griffin argues that section 1.218(a)(14) is void for vagueness, since the regulation's use of undefined terms such as "oration" or "partisan activity" permits VA officials to punish disfavored speakers without specifying in advance what forms of speech are prohibited.

We note that Mr. Griffin's demand to the VA was for permission to display the Confederate flag. He did not ask specific permission to make speeches, conduct ceremonies, or hold demonstrations, even though he now attacks the regulation in part because it gives VA officials the power to restrict those other forms of expression. n6

> n6 Although we treat Mr. Griffin's request as directed only to display of the Confederate flag, his request is subject to a broader interpretation. His request sought permission first to erect a flag pole, and every day thereafter to "display the flag, change and

> remove flags from the cemetery." Mr. Griffin did not describe any particular ritual that may be involved in raising and lowering, or changing and removing, a Confederate flag. Before the VA's denial of his request, the VA initially opined that the Confederate flag could be displayed only as "part of an approved ceremony or special activity." When Griffin in writing protested the lack of any stated standards to govern such ceremony or special activity, the VA revised its view, stating that "simple display of a flag does not qualify as a ceremony or special event." We think some uncertainty may remain as to whether more than simple flag-flying might result from granting Mr. Griffin's request.

The government does not argue that, because Mr. Griffin did not seek specific permission from the VA to engage in any expressive conduct other than display of the Confederate flag, he may only challenge those aspects of the regulation that restrict flag display. We nonetheless consider whether, in determining the scope of our review of Mr. Griffin's facial challenges, we should refuse to weigh Mr. Griffin's arguments that reach beyond the scope of his original request to the agency to display the Confederate flag.

While notions of exhaustion of administrative remedies may narrow judicial review of statutory challenges, *see Action for Children's Television v. FCC,* 313 U.S. App. D.C. 261, 59 F.3d 1249, 1256-57 (D.C. Cir. 1995), we know of no rule that would preclude our consideration of Mr. Griffin's non-flag allegations once his constitutional challenge to 38 C.F.R. § 1.218(a)(14) is properly before this court. Mr. Griffin admittedly has sought permission, a permit, to display the Confederate flag. He mounts a three-pronged facial challenge to the regulation whence the denial of his

permit request emanates. Whether or not he has in fact sought permission for any one particular type of expression, "facial attacks on discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision." *Forsyth,* 505 U.S. at 133 n.10. Further, because one subject to a standardless licensing scheme "may challenge it facially without the necessity of first applying for, and being denied, a license," *Lakewood,* 486 U.S. at 755-56, Mr. Griffin need not have applied for permission for any specific form of expression at all. He, like other First Amendment plaintiffs, is entitled to rely on the regulation's impact on "the expressive activities of others as well as [his] own." *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 66, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981). Whether a particular plaintiff has the requisite standing to complain of restrictions that have not yet been imposed is of course a matter of concern, but in this case the government raises no challenge to Mr. Griffin's standing.

We therefore conclude that no principle prevents us from considering the full scope of Mr. Griffin's challenge. n7 If we had discretion to restrict our review to nothing more than his flag display challenge, we would in fairness to Mr. Griffin decline to thus narrow our inquiry.

> n7 Our colleague in dissent, relying primarily on *United States v. Grace,* 461 U.S. 171, 175-76, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983), argues that our consideration of Mr. Griffin's facial challenge to 38 C.F.R. § 1.218(a)(14) is limited to aspects of the regulation that may apply to Mr. Griffin's own desired conduct, i.e., the flying of flags at VA cemeteries. However, Mr. Griffin raises an unbridled discretion challenge to the regulation, and Lakewood unmistakably rejects the narrow view of such

challenges. Even outside the unbridled discretion context, the Supreme Court has refused to read Grace and similar cases as limiting facial challenges to a particular kind of speech, unless the text of the statute or regulation clearly sets forth such a distinction. *See Reno v. ACLU,* 521 U.S. 844, 883-85, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997); *United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 479 n.26, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995). Lastly, we note that if the dissent is correct in its assessment that § 1.218(a)(14) is "grossly overbroad," the regulation would be struck down without reference to the particular type of speech Mr. Griffin would engage in. *See Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.,* 482 U.S. 569, 574-75, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987).

II

At the heart of Griffin's argument lies the accusation that section 1.218(a)(14) embodies an unconstitutional standardless licensing scheme, granting government officials the power to preemptively restrain speech but setting no substantive guidelines to cabin administrators' discretion. Mr. Griffin's objections arise from the provisions of section 1.218(a)(14) that permit a facility head to authorize exceptions to its prohibitions on speech. Paragraph (i) of the challenged regulation prohibits any service, ceremony or demonstration, "except as authorized by the head of the facility or designee." Likewise, among its list of activities qualifying as unauthorized demonstrations, paragraph (ii) includes the display of placards, banners, or foreign flags, "unless approved by the head of the facility or designee." Thus, 38 C.F.R. § 1.218(a)(14) allows VA officials to make

exceptions to the general ban on demonstrations and displays on VA property.

Section 1.218(a)(14) sets no explicit standards to determine when a VA official may authorize or approve exceptions to the ban. Griffin charges that in the absence of such standards, VA facility heads or other officials could grant exceptions to favored groups and deny them to disfavored groups. Such selectivity would permit VA facility heads to discriminate arbitrarily between speakers based on the viewpoint espoused by the speaker- such as forbidding Mr. Griffin to display a Confederate flag but permitting other private groups to display flags more to the VA's liking. Griffin further alleges that this power could be wielded not just to control which flags are displayed at VA cemeteries, but also to restrict formal speeches or even casual comments on VA property.

Mr. Griffin thus seeks to bring section 1.218(a)(14) within that category of licensing schemes that have long been held to violate the First Amendment for vesting a government official with "unbridled discretion" to permit or suppress speech at will. The broadest expression of this principle is found in *City of Lakewood v. Plain Dealer Publishing Co.,* in which Justice Brennan, speaking for a 4-3 majority of the Court, stated:

> [A] facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.

486 U.S. at 759. In this formulation, it is the very existence of such power, not how it is exercised, that renders a licensing law unconstitutional.

According to the majority opinion in *Lakewood*, facial challenges should be permitted against standardless licensing schemes because two aspects of such laws make as-applied challenges difficult. First, the very existence of the licensor's unfettered discretion, coupled with the power of prior restraint, may intimidate parties into censoring their own speech rather than challenging the restraint. *Id.* at 757-58. Second, the absence of express standards for a license makes it difficult to prove illicit discrimination in an as-applied challenge. Given the burden of challenging the licensor's actions case-by-case, these barriers to as-applied challenges may render the licensor's decisions unreviewable unless facial challenges are allowed. *Id.* at 758-59.

A

In considering Mr. Griffin's challenge, we assume that section 1.218(a)(14) may act as a prior restraint on speech, and we further assume that the power to grant exceptions raises the same concerns of selective application that render standardless licensing schemes vulnerable to an unbridled discretion challenge. The government has not attempted to dispute either point. However, we must ask independently whether Mr. Griffin has standing to bring a facial challenge. With the reversal of his as-applied challenge by the Fourth Circuit, Mr. Griffin cannot claim any infringement of his own constitutional rights, at least as far as his proposed flag display at Point Lookout Cemetery. Arguably, there is confusion as to whether one challenging a licensing scheme must allege that the regulation can never be applied in a valid manner, or must allege injury to third parties not before

the court via the overbreadth doctrine. Compare *City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 796-798, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (describing unbridled discretion challenges as cases in which "every application of the statute created an impermissible risk of suppression of ideas") with *Finley,* 524 U.S. at 618-19 (Souter, J., dissenting) (describing unbridled discretion challenges as overbreadth challenges); *Forsyth,* 505 U.S. at 129-30 (same); *Boos v. Barry,* 485 U.S. 312, 329, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988) (same). But regardless of how facial attacks against standardless licensing schemes might be formally classified, the Supreme Court has made clear that standing to challenge such schemes does not depend on whether the challenger's own conduct may be proscribed. *Lakewood,* 486 U.S. at 755-56 (quoting *Freedman v. Maryland,* 380 U.S. 51, 56, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965)). We therefore conclude that Mr. Griffin may raise a facial challenge to section 1.218(a)(14), regardless of the ultimate outcome of his as-applied challenge or whether the VA grants him permission to display a Confederate flag at Point Lookout Cemetery.

We are mindful, however, that under any formulation, Mr. Griffin must show that 38 C.F.R. § 1.218(a)(14) poses more than a theoretical danger to protected speech. Even under the broad articulation of *Lakewood*, an unbridled discretion challenge is circumscribed by the proviso that the challenged regulation must "pose a real and substantial threat of the identified censorship risks." *Lakewood,* 486 U.S. at 759. And when the plaintiff alleges that a law invests the government with discretion to discriminate on the basis of viewpoint, "such a 'facial challenge will not succeed unless the statute is "substantially" overbroad,' by which we mean that 'a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications.'"

Finley, 524 U.S. at 619 (Souter, J., dissenting) (citations omitted) (quoting *N.Y. State Club Ass'n, Inc. v. City of New York.,* 487 U.S. 1, 11 (1988), and *New York v. Ferber,* 458 U.S. 747, 771, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)). Thus, while we need not inquire whether Mr. Griffin's own conduct would be constitutionally protected in order to consider his facial challenge, Mr. Griffin must still show a realistic possibility that application of section 1.218(a)(14) will suppress a substantial amount of constitutionally protected speech. See, e.g., *United States v. Kalb,* 234 F.3d 827, 834 (3d Cir. 2000).

B

We turn now to the merits of Griffin's challenge. Government restrictions on speech on public property are traditionally analyzed by classifying the regulated property as one of three kinds of fora described by the Supreme Court: public fora, designated public fora, and nonpublic fora. In traditional public fora, devoted to assembly and debate by long tradition or government fiat, the government may exclude a speaker only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. In designated public fora, which the government creates by intentionally opening a forum to certain classes of speakers, the government's exclusion of a speaker who falls within the class to which the forum is made generally available will be subjected to strict scrutiny. In nonpublic fora, the government may restrict access by content or speaker identity, so long as the restrictions are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Thus, restraints on speech in a nonpublic forum

will be upheld unless they are unreasonable or they embody impermissible viewpoint discrimination.

All of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside the setting of a public forum. While an overbreadth challenge against an entirely unreasonable restraint will succeed regardless of how the forum is classified, *see Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987), we have no accepted framework to decide how an unbridled discretion challenge should be evaluated in a nonpublic forum.

Griffin would have us essentially ignore the forum doctrine. He argues, without apparent support from the case law, that a grant of unbridled discretion enables arbitrary discrimination, and since arbitrariness is unreasonable, such a grant of discretion can never be reasonable and cannot be sustained even in a nonpublic forum. At bottom, Griffin urges us to adopt a per se rule that every grant of unbridled discretion is facially unconstitutional. For its part, the government either seems unaware of or chooses to ignore the unbridled discretion doctrine entirely. It argues only that section 1.218(a)(14) meets a rational basis test. We reject both extremes. We believe our task is to reconcile the demands of both doctrines, and consider both together under the particular circumstances of Mr. Griffin's case.

Both parties agree that VA cemeteries are nonpublic fora, and other courts have also concluded that public cemeteries are nonpublic fora for purposes of First Amendment analysis. *See Griffin,* 129 F. Supp. 2d at 840; *Warner v. City of Boca Raton,* 64 F. Supp. 2d 1272, 1291

(S.D. Fla. 1999). We will assume for purposes of our analysis that VA cemeteries are nonpublic fora, since no evidence before us suggests otherwise and no party urges a contrary finding. However, except for the special prohibition against physical recreation in cemeteries, section 1.218(a)(14) regulates conduct not just at national cemeteries, but at all property administered by the VA. 38 C.F.R. § 1.218(a) (2001) ("The following rules and regulations apply at all property under the charge and control of VA ... and to all persons entering in or on such property."). Formally, in this facial challenge, the fact that Mr. Griffin has sought access to a national cemetery is irrelevant to the question of whether section 1.218(a)(14) vests VA facility heads with impermissibly broad discretion to suppress speech. But since we have no reason to conclude that other VA property ought to be classified as a traditional or designated public forum, we shall assume that other VA properties are also nonpublic fora and we need not consider how a facial challenge should weigh against a regulation that governs both public and nonpublic fora. Furthermore, Mr. Griffin makes no allegation that section 1.218(a)(14) poses a risk of censorship at any VA property other than national cemeteries, or that he or any parties not before the court desire to speak at other kinds of VA property. If national cemeteries are where the alleged threat to free expression is lodged, then we think it appropriate to focus on national cemeteries when we evaluate the relationship between the alleged restraint, the speech so restrained, and the nature of the forum. Our analysis therefore will take into account not only the fact that VA properties are nonpublic fora, but also the relevant characteristics of national cemeteries to the extent that those characteristics have been presented to the court.

As we have explained, no Supreme Court decision attempts to apply the unbridled discretion doctrine in the context of a nonpublic forum. By its terms, the unbridled discretion doctrine has been articulated as a limit on licensing regimes in public fora. See, e.g., *Shuttlesworth v. City of Birmingham, Ala.,* 394 U.S. 147, 153, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969) ("We have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.") (quoting *Kunz v. New York,* 340 U.S. 290, 293-294, 95 L. Ed. 280, 71 S. Ct. 312 (1951)). In a nonpublic forum, the government is said to operate as proprietor, not licensor. *See United States v. Kokinda,* 497 U.S. 720, 725, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990). Nonetheless, we are aware of several cases from our sister circuits that have struck down standardless licensing schemes in nonpublic fora. Perhaps the leading circuit case is *Sentinel Communications Co. v. Watts,* 936 F.2d 1189 (11th Cir. 1991), in which the Eleventh Circuit invalidated a statutory scheme that gave a government employee in Florida unfettered discretion over the placement of newspaper racks in rest areas along the interstate highway. Concluding that rest areas were nonpublic fora, the Eleventh Circuit nonetheless held that nonpublic forum status "does not eliminate the constitutional requirement of standards for discretionary licensing. It may, however, require that any regulations or standards promulgated ... be reviewed only for reasonableness instead of some higher level of scrutiny." *Id.* at 1199 n.11 (quoting *N.Y. News, Inc. v. Metro. Transp. Auth.,* 753 F. Supp. 133, 140 (S.D.N.Y. 1990)). No court has suggested exactly how this more deferential scrutiny should be applied.

The text of section 1.218(a)(14) sets no explicit limit on the discretion of VA officials to permit exceptions, and the

government has given us little or no reason why this grant of discretion differs from those that have been struck down as unconstitutional in the past. We do not believe, however, that we are compelled to apply the unbridled discretion doctrine mechanically and strike down section 1.218(a)(14) without inquiry into the characteristics of the relevant forum. We are obliged to examine the nature of the forum because restrictions in nonpublic fora may be reasonable if they are aimed at preserving the property for the purpose to which it is dedicated. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 50-51, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). As the Court has explained, "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Kokinda,* 497 U.S. at 732 (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 650-651, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981)). *See also Cornelius,* 473 U.S. at 809. Thus, in particular circumstances, grants of discretion in nonpublic fora have been upheld–despite the absence of substantive standards or procedural safeguards–when such discretion is necessary to preserve the function and character of the forum. See, e.g., *Muller by Muller v. Jefferson Lighthouse Sch.,* 98 F.3d 1530, 1540-1541 (7th Cir. 1996) (applying nonpublic forum doctrine to uphold prior restraint in public school). To determine whether section 1.218(a)(14) violates the First Amendment as a standardless licensing scheme, we must assess whether the discretionary power granted to VA officials by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries.

At the outset, we conclude that greater latitude ought to be accorded to government officials in nonpublic fora.

Selectivity and discretion are some of the defining characteristics of the nonpublic forum. For example, in Perry, the fact that individual building principals had to give permission for use of school mail systems tended to show that the mail system was a nonpublic forum. *See Perry,* 460 U.S. at 47. Cornelius distinguished nonpublic fora from those fora in which the decision to admit a speaker is "merely ministerial"–that, is without discretion. n8 *See Cornelius,* 473 U.S. at 804. While one might protest that such logic undercuts the fundamental premise of the unbridled discretion doctrine, *see Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 693 n.18, 140 L. Ed. 2d 875, 118 S. Ct. 1633 (1998) (Stevens, J., dissenting), the fact that discretionary access is a defining characteristic of the nonpublic forum should suggest that more official discretion is permissible in a nonpublic forum than would be acceptable in a public forum. Moreover, while the fact that the government may constitutionally impose content-based restrictions on speech in nonpublic fora does not insulate a regulation from an unbridled discretion challenge, *see Lakewood,* 486 U.S. at 764, a restriction on expression at VA property does not pose the same threats to expression identified by Lakewood in licensing schemes that restrict newspapers or other media in the public forum. The rationale for a facial challenge is correspondingly weaker. *See Lakewood,* 486 U.S. at 757-59 (explaining that political, financial, and time constraints may make as-applied challenges by the media impossible in practice).

> n8 Ministerial: Of or relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill. Black's Law Dictionary 1011 (7th ed. 1999) (emphasis added).

Turning to the nature and function of national cemeteries, we find that the government has established national cemeteries to serve particular commemorative and expressive roles. By the express command of Congress, cemeteries under control of the VA "shall be considered national shrines as a tribute to our gallant dead." 38 U.S.C. § 2403(c) (1994). Under this statute, the VA imposes on itself the duty "to maintain those cemeteries as national shrines in perpetuity as a final tribute of a grateful Nation to honor the memory and service of those who served in the Armed Forces." Dep't of Veterans Affairs, Statement of Regulatory Priorities, 66 Fed. Reg. 61,261-01 (Unified Agenda, Dec. 3, 2001). Because the government has established national cemeteries as shrines to honor the memory of those who served, maintaining an atmosphere of tranquility and respect is necessarily central to the purpose of the forum. Consequently, the government may need to decide what forms of expression are compatible with this atmosphere of solemnity in order to preserve the forum for the purpose it was established. In a First Amendment analysis, an agency's mandate to make such judgments sets those judgments apart from comparatively objective decisions, such as access to a school auditorium or municipal theater. *See Finley,* 524 U.S. at 586. It follows that the government must have greater discretion to decide what speech is permissible in national cemeteries than in those fora which serve no such patriotic purpose for the government.

National cemeteries also serve important expressive functions for the government. At least some speech at national cemeteries–such as the statutorily-required display of the United States and POW/MIA flags–is government speech. We have no doubt that the government engages in speech when it flies its own flags over a national cemetery, and that its choice of which flags to fly may favor one

viewpoint over another. Such speech, and such discrimination between competing viewpoints, does not, however, implicate the First Amendment rights of others. The government is entitled to full control over its own speech, whether it speaks with its own voice or enlists private parties to convey its message, and the remedy for dissatisfaction with its choices is political rather than judicial. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 235, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 833, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995). Thus, the government's decision to fly or not fly a particular flag--be it that of the Union or the Confederacy-- does not trespass upon the First Amendment. *NAACP v. Hunt,* 891 F.2d 1555, 1566 (11th Cir. 1990). n9

> n9 Recognizing this principle, Griffin does not here allege that the government's choice to promote one flag over another in a national cemetery raises concerns of content or viewpoint discrimination per se. Rather, his petition rests on the well-established theory that the mere existence of unbridled censorship power may chill a substantial amount of protected speech, even if the censor never actually favors one viewpoint over another. *See Lakewood,* 486 U.S. at 757-59. Griffin has not suggested that the government's decision to favor certain flags is vulnerable to a charge of viewpoint discrimination in this facial challenge.

While we have no evidence before us to indicate what mix of government speech, invited speech, and private speech may be found at national cemeteries, we believe that the use of national cemeteries for government speech heightens the discretion to be afforded to facility administrators. The government may, of course, restrict use

of its property to deliver its own messages. n10 "Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000). *See also Forbes,* 523 U.S at 673-83 (upholding exclusion of candidate from televised debate as permissible exercise of "editorial discretion" in nonpublic forum). Where, as here, the government seeks to project a certain image and atmosphere, it must be especially sensitive to concerns that private speech taking place in the same forum might be perceived by listeners as government speech, or might dilute the government's own message. The government therefore must exercise discretion and judgment to decide what speech is appropriate for national cemeteries.

> n10 The government may also invite particular speakers into nonpublic fora to deliver messages of its choice without obliging itself to invite speakers of opposite viewpoints, when such messages further the purposes of the forum. *See Cornelius,* 473 U.S. at 820 (Blackmun, J., dissenting); *Greer v. Spock,* 424 U.S. 828, 838 n.10, 47 L. Ed. 2d 505, 96 S. Ct. 1211 (1976).

Of course, any individual decision to exclude or permit a certain speaker remains vulnerable to an as-applied challenge if that decision is unreasonable or viewpoint-discriminatory. But Mr. Griffin has not convinced us that preserving the national cemetery for the government's own expressive purposes can be accomplished without vesting a significant degree of discretion in VA facility heads.

In short, national cemeteries are not interstate highway rest areas. The nature and function of the national cemetery

make the preservation of dignity and decorum a paramount concern, and the government may impose restraints on speech that are reasonable in that pursuit. Because the judgments necessary to ensure that cemeteries remain "sacred to the honor and memory of those interred or memorialized there" may defy objective description and may vary with individual circumstances, we conclude that the discretion vested in VA administrators by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries.

C

We additionally must deny Mr. Griffin's petition to invalidate section 1.218(a)(14) because we do not believe a real and substantial threat to expression flows from the alleged unbridled discretion vested in VA facility heads. As we discuss above, a facial attack will not succeed unless the challenger establishes a real and substantial risk that the challenged regulation will suppress or chill protected speech. This requirement stems from one of the basic premises of facial challenges, that "the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Forsyth,* 505 U.S. at 129. Accordingly, while we must bear in mind that the opportunity to present evidence is limited if a facial challenge to VA regulations may be brought only before an appellate court, we cannot invalidate section 1.218(a)(14) unless Mr. Griffin has convinced us that the regulation may significantly compromise First Amendment protections. *See Vincent,* 466 U.S. at 801.

Mr. Griffin has made no allegations that section 1.218(a)(14) will chill speech in any venue other than national cemeteries. It has not been said, for example, that

the VA must promulgate narrow, objective, and definite standards for what banners may be flown atop VA buildings, or for what kinds of orations may be made within its offices–even though section 1.218(a)(14) could be used to punish those who performed such acts without authorization. Mr. Griffin has therefore given us little reason to conclude that the challenged regulation "reaches a substantial number of impermissible applications." *Ferber,* 458 U.S. at 771.

While Mr. Griffin brings a facial challenge to the entire system regulating expression on VA property, his allegations focus on the threat posed by VA administrators' unbridled discretion to permit or prohibit flag displays–displays which we readily admit constitute expression. But, at least since 1995, the discretion of VA administrators has been constrained (although not eliminated) by the VA's detailed Flag Manual, as set forth in NCA Directive 3220. Unbridled discretion need not be exercised to be unconstitutional. However, binding administrative construction, or a well-understood and uniformly applied practice, may set limits on official discretion that are otherwise not apparent from the face of a challenged regulation. *Lakewood,* 486 U.S. at 770; *Kalb,* 234 F.3d at 835; *United States v. Linick,* 195 F.3d 538, 542 (9th Cir. 1999). Even unwritten speech policies may survive constitutional challenge if uniformly enforced. *Wells v. City & County of Denver,* 257 F.3d 1132, 1150-51 (10th Cir. 2001). The Flag Manual may not impose definitive constraints on the enforcement of section 1.218(a)(14), but it does appear to set forth a consistent VA policy on flag display. The irony of Mr. Griffin's unbridled discretion challenge is that, excepting the supposedly unauthorized display at Point Lookout from 1994 to 1998, the VA's policy on flag display, and Confederate flag display in particular, has been clear and unwavering. The 1995 Flag Manual specified that the primary flags authorized for

display at national cemeteries were the United States flag, the VA flag, State flags, the POW/MIA flag, and the Confederate flag--although display of the Confederate flag was permitted only on two days of the year and was subordinate to the United States flag. While the VA's official policy restricting Confederate flag display displeased Mr. Griffin and the Sons of Confederate Veterans, the record before us suggests that VA flag display policy has left little room for arbitrary or discriminatory enforcement by individual cemetery officials.

Both the 1995 Flag Manual and the 2001 Flag Manual do grant facility heads the discretion to permit display of other flags "for special occasions," so long as such flags "commemorate honorable military service." However, the current directive provides multiple examples that delineate what kind of displays are permissible, and the directive requires, at least in theory, that any flag "not promote any particular viewpoint or ideology." If this discretion is all that is afforded to facility heads, then it is not enough to render the VA's regulatory scheme unconstitutional. A limited exception "for special occasions" does not negate the constraining effect of the Flag Manual. While the existence of the Flag Manual alone might not save 38 C.F.R. § 1.218(a)(14) from constitutional challenge, the Flag Manual significantly reduces the risks the regulation may pose to protected speech.

Section 1.218(a)(14) restricts forms of expression other than flag display on VA property, such as demonstrations, picketing, or orations. However, Griffin makes only the thinnest and most unsubstantiated allegations that unbridled exercise of these provisions will threaten his own rights or the rights of third parties not before the court. For example: "Mr. Griffin or his colleagues might make a remark about

VA flag policy (arguably a 'partisan' statement) to an 'assembled group of people,'" and "§ 1.218(a)(14) could be used in a highly unpredictable and arbitrary fashion to punish people who say things the VA does not like. It could also be used to arrest people who merely listen to prohibited speech." We do not think that these speculative allegations meet the "heavy burden" required for facial invalidation of a law. As the Supreme Court has stated, "we are reluctant, in any event, to invalidate legislation 'on the basis of its hypothetical application to situations not before the Court.'" *Finley,* 524 U.S. at 584 (quoting *FCC v. Pacifica Found.,* 438 U.S. 726, 743, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978)). Although we acknowledge the theoretical possibility that the VA might exercise its power to grant exceptions in order to favor only those orations or demonstrations that are to the government's liking, we do not believe that this possibility alone justifies the drastic remedy of facial invalidation. *See Kalb,* 234 F.3d at 835.

To summarize: Considering the esthetic judgments inherently necessary to maintain VA cemeteries as national shrines, we find that the restraints on expression imposed by 38 C.F.R. § 1.218(a)(14) are not so unreasonable as to render the regulation facially invalid. Griffin's vague allegations that some people might be prevented or discouraged from speaking do not establish that section 1.218(a)(14) will reach a substantial amount of protected speech or that its impermissible applications substantially exceed its permissible ones.

While the discretion vested in VA officials must still be subject to the constitutional limitation that a speaker cannot be excluded solely to suppress the speaker's viewpoint on an otherwise permissible subject, we think as-applied challenges to particular acts of viewpoint discrimination are

a more appropriate means to ensure that VA facility heads do not wield their power to grant exceptions arbitrarily or unreasonably. As the Supreme Court recently stated in rejecting a similar unbridled discretion challenge:

> Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting on a degree of rigidity that is found in few legal arrangements.

Thomas v. Chi. Park Dist., 534 U.S. 316, 122 S. Ct. 775, 781, 151 L. Ed. 2d 783 (2002). We reach the same conclusion here not only because the *Lakewood* rationales for facial invalidation are weak in the context of this challenge, but also because granting petitioners their requested relief and invalidating 38 C.F.R. § 1.218(a)(14) in its entirety would leave the VA without any power to restrict any visitor's conduct at any VA facility–including hospitals, office buildings, and the like. We do not mean to suggest that regulations stand less chance of being invalidated the more broadly drawn they are. But having availed themselves of the opportunities of the facial doctrine, petitioners must also bear the "heavy burden" imposed on those seeking to invalidate a law on its face. We do not believe that burden has been met in the case before us.

III

Griffin also raises, as a separate matter, the contention that section 1.218(a)(14) fails First Amendment scrutiny because the VA's decision to permit or deny exceptions to

the ban on unauthorized demonstrations is not subject to any procedural safeguards, time limits, or provisions for judicial review. Such procedural safeguards have long been required for explicit censorship schemes restricting expression in public fora. See, e.g., *Freedman v. Maryland,* 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965). The rationale behind this requirement is similar to that of the unbridled discretion doctrine. If a licensing scheme allows a government official to delay indefinitely before approving or denying a license, then a system masquerading as a time, place or manner regulation may in reality allow officials to suppress disfavored speech arbitrarily. *See FW/PBS v. City of Dallas,* 493 U.S. 215, 226-28, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990).

However, the procedural safeguards requirement has little relevance to the present case. The doctrine comes into play primarily "when a State undertakes to shield the public from certain kinds of expression it has labelled offensive." *M.I.C. Ltd. v. Bedford Township,* 463 U.S. 1341, 1343, 77 L. Ed. 2d 1442, 104 S. Ct. 17 (Brennan, Circuit Justice 1983). Few cases invoke the requirement for procedural safeguards unless an explicit censorship scheme--which by definition is not content-neutral--is under attack, and the Supreme Court recently has confirmed that the procedural safeguards doctrine is so limited in scope. *See Thomas,* 122 S. Ct. at 779-80 (holding that content-neutral regulations need not satisfy Freedman's requirement for procedural safeguards).

To the extent its concerns are not subsumed into the unbridled discretion analysis, the procedural safeguards requirement provides little or no independent basis for striking down a regulation in a nonpublic forum. While some courts identify the lack of procedural safeguards as an added liability of schemes they condemn for unbridled discretion, we are aware of no case demanding procedural safeguards as

an independent requirement in a nonpublic forum. Indeed, exclusions of speakers from nonpublic fora have been upheld despite a complete absence of established procedures for making such decisions. *See*, e.g., *Forbes,* 523 U.S. 666, 140 L. Ed. 2d 875, 118 S. Ct. 1633; *Greer,* 424 U.S. 828, 47 L. Ed. 2d 505, 96 S. Ct. 1211. Since one rationale for the nonpublic forum classification is to give the government wider leeway over the conduct of its internal affairs, *see Cornelius,* 473 U.S. at 805-06, it would be counterproductive to encumber decisions that may affect the government's own expressive use of the forum with requirements for procedural safeguards.

We find no rationale for independent application of the procedural safeguards requirement here. We note that the current implementation of NCA Directive 3220 requires the NCA's Deputy Under Secretary for Operations to approve or deny exceptions to the flag policy within five business days--although individual Cemetery Directors seem to be under no obligation to forward recommendations to the Deputy Under Secretary promptly. n11 Nonetheless, Griffin has not shown that imposing additional procedural requirements on the VA's decision-making process would materially advance First Amendment interests by increasing expression, or that any potential expression would be chilled by the VA's lack of procedural safeguards. If the VA may legitimately make discretionary judgments to exclude certain speakers, then the procedures by which it may do so become less critical. The need for swift decisions is less compelling in the calm of national cemeteries than in public fora, where delayed resolution of a permit dispute may be fatal to a newspaper publisher or movie distributor.

n11 Under the April 30, 2001, revision of NCA Directive 3220, a Cemetery Director is authorized only

to deny a flag display request, or to recommend to the Deputy Under Secretary that the request be approved.

IV

Finally, Mr. Griffin alleges that section 1.218(a)(14) is void for vagueness, since the terms "oration," "assembled groups of people," and "partisan activity" are employed but not defined by the regulation. While the overbreadth and vagueness doctrines are analytically distinct, Mr. Griffin's vagueness challenge resembles his unbridled discretion challenge because in both he alleges that section 1.218(a)(14) may suppress protected expression by arbitrary and discriminatory enforcement.

We express some skepticism whether Mr. Griffin may bring a vagueness challenge, simply because it is not clear he has suffered injury from the challenged portions of the regulation. Griffin complains that the terms "any oration or similar conduct to assembled groups of people" and "partisan activity" are impermissibly vague. In the First Amendment context, a challenger may mount a facial vagueness attack upon a statute even if its meaning is plain as applied to his or her own conduct. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59-60, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). However, Mr. Griffin's past injuries stem from the VA's refusal to permit him to display a historical flag--conduct which may not be regulated by the allegedly vague terms. While Mr. Griffin presents some amorphous claims that he or others may wish to express themselves in the future in a manner that the VA might consider an "oration" or "partisan activity," courts are reluctant to confer standing on challengers who present unsubstantiated allegations of a subjective chill rather than a specific threat of present or

future harm. *See Convoy, Inc. v. City of San Diego,* 183 F.3d 1108, 1112 (9th Cir. 1999).

Assuming Mr. Griffin has standing to bring a facial vagueness challenge, n12 we still cannot strike down section 1.218(a)(14) unless the regulation's vagueness poses a real and substantial threat to protected expression. *See Young,* 427 U.S. at 60. Mr. Griffin has done no more than speculate that third parties, or even he himself, might be subject to criminal penalties for uttering the wrong words on VA property. While unconstitutional application of the law is not a prerequisite for a facial attack, we have no indication before us that the VA has ever penalized a speaker for unauthorized orations or partisan activity on VA property. As the Supreme Court has explained, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado,* 530 U.S. 703, 733, 147 L. Ed. 2d 597, 120 S. Ct. 2480 (2000) (quoting *United States v. Raines,* 362 U.S. 17, 23, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960)).

n12 The government has not contested Mr. Griffin's right to bring a vagueness challenge.

Even if the challenged terms were not valid in most of their intended applications, we explain above that Mr. Griffin has not shown that application of section 1.218(a)(14) will significantly limit protected speech by third parties not before the court. A few speakers may be deterred because they are uncertain if the VA will punish their conduct as a "demonstration," "oration," or "partisan activity," but "the touchstone of a facial vagueness challenge in the First Amendment context, however, is not whether

some amount of legitimate speech will be chilled; it is whether a substantial amount of legitimate speech will be chilled." *Calif. Teachers Ass'n v. State Bd. of Educ.,* 263 F.3d 888, 898 (9th Cir. 2001).

Nor, if we were convinced that the allegedly vague terms posed a real and substantial threat to protected expression, would we conclude that they are unconstitutionally vague. Griffin has not established that the challenged terms fail to provide persons of ordinary intelligence a reasonable opportunity to know what is prohibited. While Mr. Griffin can conceive of hypotheticals in which the application of the challenged terms would be debatable, such ambiguities do not rise to the level of unconstitutional vagueness. *See Grayned v. City of Rockford,* 408 U.S. 104, 110 n.15, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

We note that the regulation itself literally prohibits only unauthorized services, ceremonies, or demonstrations, *see* 38 C.F.R. § 1.218(a)(14)(i) (2001); all of the challenged terms appear as examples of unauthorized demonstrations. Terms like "demonstration" standing alone have been upheld against vagueness attack. See, e.g., *Schenck v. Pro-Choice Network of W. N.Y.,* 519 U.S. 357, 383, 137 L. Ed. 2d 1, 117 S. Ct. 855 (1997); *Culver v. Sec'y of the Air Force,* 559 F.2d 622, 628-629 (D.C. Cir. 1977). We therefore doubt that additional terms fleshing out the definition of "demonstration" render the prohibition unconstitutionally vague.

The term "partisan activity" is well-explained by the regulation and we fail to see any real ambiguity in its definition. Likewise, while "assembled groups of people" is not a precise term, one must deliver an "oration or similar conduct" to said groups in order to run afoul of the regulation to begin with. We note that Congress has similarly

prohibited "orations" on other government property at which decency and decorum are central to the purpose of the forum, such as the Library of Congress and the Supreme Court building. 2 U.S.C. § 167d (2000); 40 U.S.C. § 13j (1994). Challenged terms must be read in context of the regulation as a whole, *see Grayned,* 408 U.S. at 110, and we have little doubt that visitors of ordinary intelligence reading section 1.218(a)(14) would understand what behavior was expected of them on VA property--particularly on the grounds of a national cemetery.

"While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) (rejecting facial challenge to regulations that required sound level to be "balanced with respect for nearby residential neighbors"). Although the theoretical possibility that violators of section 1.218(a)(14) will be subject to criminal prosecution raises the level of scrutiny we must apply, we do not believe that Mr. Griffin has carried the burden either of showing that the challenged terms are unconstitutionally vague or that any such vagueness would pose a real and substantial threat to protected speech.

CONCLUSION

For the reasons set forth above, we hold that 38 C.F.R. § 1.218(a)(14) does not on its face violate the First Amendment. We therefore deny the petition to invalidate the regulation.

COSTS

No costs.

DENIED

DISSENT:

DYK, Circuit Judge, concurring in part and dissenting in part.

I generally agree with the majority's well-reasoned rejection of appellant's claim that section 1.218(a)(14) of the VA regulations is facially unconstitutional insofar as it regulates the flying of flags in VA cemeteries. However, I dissent to the extent that the majority, in purporting to resolve an overbreadth claim, addresses the constitutionality of other aspects of this VA regulation, aspects that have not even been challenged before the VA itself.

I

Section 1.218(a)(14) of the VA regulations appears to be grossly overbroad. Indeed, it reads like a law school examination question in which law students are invited to find the maximum number of serious constitutional issues raised by a hypothetical ordinance. By barring unauthorized "partisan activities," defined as "those involving commentary or actions in support of, or in opposition to, or attempting to influence, any current policy of the Government of the United States, or any private group, association, or enterprise," 38 C.F.R. § 1.218(a)(14)(ii) (2001), the regulation appears to bar political discussions by patients at a VA hospital or by employees at the VA headquarters building, even though such activities are constitutionally protected. *See Rankin v. McPherson*, 483 U.S. 378, 388-89, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987) (finding discharge

of county employee unconstitutional where employee made inappropriate comment to coworker regarding attempted assassination of President Reagan). It bars the unauthorized use of "coarse" or "abusive" language, even though the Supreme Court has held such terminology in statutes to be unconstitutionally vague. *Gooding v. Wilson,* 405 U.S. 518, 525-28, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972) (finding statute prohibiting "abusive" language unconstitutionally vague and overbroad). It appears to bar unauthorized "picketing" or orations on sidewalks that are part of VA facilities, even though such conduct is protected. *United States v. Grace,* 461 U.S. 171, 183, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983) (finding section of federal statute prohibiting picketing and leafleting on sidewalks surrounding Supreme Court building unconstitutional). If we were compelled by the overbreadth doctrine to consider the facial constitutionality of this regulation in all contexts, I would likely find it unconstitutional because it is substantially overbroad.

The majority writes that "we know of no rule that would preclude our consideration of Mr. Griffin's non-flag allegations once his constitutional challenge to 38 C.F.R. § 1.218(a)(14) is properly before this court." Ante at 10. I respectfully disagree. I think we are not obligated, or even permitted, by the Supreme Court's First Amendment jurisprudence to consider the hypothetical applications of this regulation in deciding the constitutionality of the portion of the regulation reaching Griffin's conduct. As Justice Scalia has noted, the overbreadth doctrine is in some tension with the Article III case and controversy requirement. *City of Chicago v. Morales,* 527 U.S. 41, 77, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999) (Scalia, J., dissenting) ("For the Court ... to go further and pronounce that the statute is unconstitutional in all applications ... seems to me no more

than an advisory opinion. ..."). Often a determination that a statute is fatally overbroad means simply that the statute is unconstitutional in the context of the particular controversy, the unconstitutional portion is significant, and the constitutional part cannot be severed from the unconstitutional parts. *See Ashcroft v. Free Speech Coalition,* 2002 U.S. LEXIS 2789, 122 S. Ct. 1389, 1406 (2002). But the overbreadth doctrine may also sometimes allow the court to hold a statute unconstitutional without explicitly determining whether, in the language of the seminal *Thornhill v. Alabama* decision, "the evidence ... could ever support a conviction founded upon different and more precise charges." 310 U.S. 88, 96, 84 L. Ed. 1093, 60 S. Ct. 736 (1940). Even at its outer reaches, when used in this sense the overbreadth doctrine does no more than permit a regulated party to challenge a permit system without seeking a permit, *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 755-56, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988); *Lovell v. City of Griffin,* 303 U.S. 444, 452-53, 82 L. Ed. 949, 58 S. Ct. 666 (1938); or permit a regulated party to challenge a licensing scheme for movie obscenity without first submitting the film in question for approval, *Freedman v. Maryland,* 380 U.S. 51, 54-56, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965); or permit a regulated party to challenge a statutory scheme allowing state judges to prohibit the future exhibition of motion pictures that have not yet been found obscene, regardless of whether the film in question is obscene, *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316-17, 63 L. Ed. 2d 413, 100 S. Ct. 1156 (1980) (per curiam). *See also* Laurence H. Tribe, American Constitutional Law § 12-35 (2d ed. 1988); 4 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 20.46 (3d ed. 1999).

The overbreadth doctrine does not give a First Amendment plaintiff or this court a roving warrant to invalidate an entire statute, ordinance, or regulation simply because portions that have nothing to do with the controversy at hand may be unconstitutional. For example, in *United States v. Grace,* 461 U.S. 171, 175-76, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983), the Court held that it should not address portions of a federal statute prohibiting demonstrations on the Supreme Court grounds, and confined its review to the portion of the statute reaching the conduct of the particular parties before it. The statute at issue in Grace prohibited two distinct activities: (1) "'to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds;'" and (2) "'to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.'" *Id.* at 175 (quoting 40 U.S.C. § 13k (1976)). The Court acknowledged that only the second portion of the statute reached the conduct of the parties before it: "the threat of arrest to which each appellee was subjected was for violating the prohibition against the display of a 'banner or device.' Accordingly, our review is limited to the latter portion of the statute." *Id.* The Court similarly limited the reach of the court of appeals' decision: "although the Court of Appeals opinion purports to hold § 13k unconstitutional on its face without any indication that the holding is limited to that portion of the statute that deals with the display of a 'flag, banner, or device,' the decision must be read as limited to that prohibition." *Id.* at 175 n.5. Even with respect to the second prohibition, the Court majority, over the dissent of Justice Marshall, limited its holding to the "public sidewalks," the only area of the Supreme Court grounds involved in the particular controversy. *Id. at 175. See also Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 502-05, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985) (invalidating statute

only in part); *United States v. Nat'l Treasury Employees Union,* 513 U.S. 454, 477-78, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995) (limiting relief to only parties before the Court).

The majority suggests that Grace is no longer good law. Ante at 11 n.7. I disagree. The majority relies on so-called unbridled discretion cases as undermining our reading of Grace and as supporting its consideration of the overbreadth challenge. As the Supreme Court's recent decision in *Thomas v. Chicago Park District,* 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002), makes clear, however, a challenge to a licensing or permit scheme on the ground that it confers unbridled discretion in an administrator or fails to incorporate required procedural safeguards is a challenge based on the regulated party's own rights, not the rights of third parties as is the case in an overbreadth challenge. The unbridled discretion cases are fully consistent with Grace.

Nor are the severability cases, *Reno v. American Civil Liberties Union,* 521 U.S. 844, 883-85 (1997), and *National Treasury Employees Union,* 513 U.S. at 479 n.26, relevant to the propriety of an overbreadth challenge. These cases simply address the question whether, if a statute is unconstitutional in part as a result of the court's holding in a particular case, the statute as a whole must be invalidated, or whether it can be save in other applications not before the court. *See also Free Speech Coalition*, 122 S. Ct. at 1410 (O'Connor, J., concurring in judgment in part and dissenting in part) (three dissenting justices urging that application of *Grace* should result in only partial invalidation of the statute). There is no need to consider any severability question here since we sustain the statute insofar as it regulates the flying of flags in VA cemeteries.

The majority's insistence on entertaining the overbreadth challenge is particularly curious since the majority rejects the petitioner's claims because VA cemeteries are simply different from other factual contexts.

In this case, the only portion of section 1.218(a)(14) reaching Griffin's conduct is that relating to the flying of flags in VA cemeteries. These plaintiffs lack standing to challenge any other aspect of the regulations. Accordingly, we should confine our review to the flying of flags in VA cemeteries, lest we render what is in effect an advisory opinion. We are simply not authorized to conjecture about the possible constitutionality of the myriad other applications of the regulation.

II

There is yet another reason to avoid petitioner's invitation to consider other portions of this ordinance: these arguments were not even raised before the VA. It is well established that the doctrine of exhaustion of administrative remedies applies in the case of constitutional challenges to regulatory action. *Syracuse Peace Council v. FCC,* 276 U.S. App. D.C. 38, 867 F.2d 654, 656-57 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019, 107 L. Ed. 2d 737, 110 S. Ct. 717 (1990). Here, petitioner's claim before the VA was simply that the regulation was unconstitutional insofar as it regulated the flying of the Confederate flag at VA cemeteries. In his petition to the VA, petitioner stated:

> We further request that you and the Department of Veterans Affairs ("VA") agree to waive and rescind 38 C.F.R. 1.218(a)(14) and any other VA rules or regulations that might be interpreted to prohibit the above-

> requested display of the Confederate battle flag at the Cemetery.

(emphasis added).

The VA has thus been given no opportunity to pass on petitioner's newly-minted constitutional claims concerning the invalidity of the regulation in other contexts. We should not address those claims for the first time on review.

Department of Veterans Affairs
Washington, DC 20420

NCA DIRECTIVE 3220
Transmittal Sheet
April 30, 2001

FLAGS IN VA NATIONAL CEMETERIES

1. REASON FOR ISSUE: To revise National Cemetery Administration (NCA) policy for displaying flags in Department of Veterans Affairs (VA) National Cemeteries.

2. SUMMARY OF CONTENTS: This directive prescribes policy related to:

   a. Displaying, handling, storage and disposition of flags in VA National Cemeteries.

   b. Clarification on displaying the Flag of the Confederate States of America (CSA).

   c. Displaying the National League of Families POW/MIA Flag (POW/MIA flag).

   d. Display of a Confederate flag as specified in the Order of the United States District Court for the District of Maryland, in Griffin v. Department of Veterans Affairs, et al., No. WMN 00-CV-2837 (Jan. 30, 2001). (Note: Appeal filed on March 28, 2001.)

3. RESPONSIBLE OFFICE: NCA, Office of Field

Programs (401A). 810 Vermont Avenue, NW, Washington, DC 20420, is responsible for the material contained in this directive.

4. RELATED HANDBOOK: NCA Handbook 3220, Flags in VA National Cemeteries, dated April 30, 2001.

5. RECISSION:

a. NCS Directive 3220, Flags in VA National Cemeteries, dated April 21, 1995.

b. NCS, Office of Field Operations Policy Letter, POW/MIA Flag Policy, dated July 10, 1998.

Roger R. Rapp
Acting Under Secretary
for Memorial Affairs

Distribution: RPC
FD

APRIL 30, 2001 NCA DIRECTIVE 3220

FLAGS IN VA NATIONAL CEMETERIES

1. PURPOSE: This directive states the Department of Veterans Affairs (VA's) National Cemetery Administration's (NCA's) policy concerning the display of flags in national cemeteries under its jurisdiction. This policy was previously contained in National Cemetery System (NCS) Directive 3220, Flags in VA National Cemeteries, dated April 21, 1995, which has been superceded and is hereby rescinded. This directive is intended to assist NCA field facilities' staff in fulfilling NCA's duty to honor those buried within its national cemeteries by maintaining the final resting places of America's veterans, and their dependents, as national shrines. The statutory authority for this directive is title 4, United States Code; title 36, United States Code, Sections 307 and 512, title 38, and United States Code, Sections 2400 through 2404. Other authorities are found in title 38, Code of Federal Regulations, Sections 1.9, 1.10, and 1.218(a)(14).

2. POLICY

   a. This directive describes NCA's policy of demonstrating appropriate respect in the display, handling, storage, and disposition of flags in national cemeteries. To that end, flags may not be displayed on NCA property as a means

for political activity or similar conduct that promotes any particular viewpoint or ideology other than to commemorate military service. The terms "National Cemetery and National Cemeteries" are understood to mean property under the jurisdiction of VA's National Cemetery Administration. This property includes all land acquired under the National Cemeteries Act of 1973, Public Law 94-43, and all property later acquired by NCA for purposes of interment and/or memorialization of veterans and their eligible dependents.

b. Deviation from NCA policy expressed in this directive is not authorized unless approved in writing by the NCA Deputy Under Secretary for Operations. The Cemetery Director has the authority to deny request for such deviation that are not in keeping with NCA's mission and the purpose of the cemetery or, in appropriate cases, recommend to the Deputy Under Secretary for Operations through the Memorial Service Network (MSN) Director that the request be approved. Such request for approval will be submitted in writing by the Cemetery Director at least fourteen (14) days before the proposed display or event will take place. Requests of this nature will be acted on within five (5) business days following receipt by the Deputy Under Secretary for Operations. The decision of the Deputy Under Secretary for Operations on such matters is final.

c. Flags authorized for public display in VA National Cemeteries are the United States of America flag, VA's distinguishing flag as described in 38 CFR Section 1.9(e), State flags (as part of an official ceremony attended by a

senior State official), the National League of Families POW/MIA flag (as authorized in 36 U.S.C. Section 902) and, under circumstances specified in paragraph 7 of this directive, a flag associated with the former Confederate States of America.

d. Certain other flags, pennants and guidon banners may be displayed at the discretion of the Cemetery Director for special occasions so long as they commemorate honorable military service and are not intended to promote any particular viewpoint or ideology other than the wish to commemorate military service. Examples of such flags are the medal of Honor flag, the Buffalo Soldiers' guidon, military ship and unit flags (which are often displayed at wreath laying ceremonies), Senior official and General Officer flags (usually displayed during an official visit), and flags commemorating national historical events.

e. Flags of Veterans Service Organizations granted congressional charters or recognized by VA under 38 CFR Section 14.628 and Military Departments may be appropriately displayed on special occasions. Such flags may also be placed in the administration building, along with the flag of the United States of America.

f. Foreign National flags may be displayed during a visit by a Head of State of a foreign government as part of an official ceremony attended by the Head of State, or during a visit by members of an official delegation of a foreign government to the United States. The graves of foreign citizens and/or prisoners of war may be decorated with their respective National flag for authorized ceremonies or

special activities conducted by their countrymen, descendants, or foreign government officials. For guidance concerning ceremonies and special events in VA National Cemeteries see the NCA Manual M40-2, Chapter 11, Ceremonies and Special Activities, dated May 1, 1984, and any superceding issuances.

g. The Cemetery Director may revoke any organization's authorization to display a flag if the organization's conduct is not in keeping with NCA's responsibilities to maintain the integrity or decorum of the cemetery. Such a decision will only occur after notice to the sponsoring organization and approval by the Deputy Under Secretary for Operations.

3. UNITED STATES OF AMERICA FLAG

a. Each VA National Cemetery will display an all-weather United States of America flag on the main flagpole each day of the year during the hours the cemetery is open, but not to exceed the hours of daylight. Cemeteries having an appropriately illuminated flagpole may display the flag during non-daylight hours so long as the flag is illuminated between the hours of sunset and sunrise.

b. VA National Cemetery personnel will display the flag of the United States of America on Memorial Day at half-staff until noon, at which time it will be raised to full staff. The flag may also be flown at half-staff when otherwise authorized (see 4 U.S.C. Section 7(m)) or by Presidential proclamation to commemorate the death of distinguished citizens, or each December 7 in honor of the individuals who died as a result of their service at Pearl Harbor (Pub.

L. 103-308).

c. VA National Cemetery personnel will bring the flag of the United States of America to half staff one-half hour before the start of the first committal service and raise it to full staff one-half hour after the conclusion of the last committal service each day.

d. No other flag will be routinely displayed subordinate to the United States of America flag on the main flagpole.

4. MEMORIAL FLAGS

a. Eligibility for and disposition of the flag of the United Stats of America for burial purposes is governed by 38 CFR 1.10.

b. VA National Cemetery Directors will ensure that caskets and urns containing the remains of eligible veterans delivered to a VA National Cemetery for burial are accompanied by a United States of America flag. This flag will be appropriately displayed during the committal service, unless the primary next of kin or, if none, the party responsible for the burial wishes otherwise.

5. AVENUE OF FLAGS

a. An "Avenue of Flags" consists of many United States of America flags arrayed on both sides of the principal drive of the main entrance into a VA National Cemetery. In newly constructed VA National Cemeteries the Avenue of Flags is the primary display of respect for the service

performed by our Nation's veterans, and may replace the decorating of individual graves with flags on Memorial Day, Veterans Day or other days of national significance.

b. Where Avenues of Flags are authorized and implemented, they are displayed on Memorial Day, Veterans Day and other days of national significance such as Flag Day and Independence Day when weather permits. The wishes of local service and civic organizations should be considered in determining on which special occasions to display the Avenue of Flags.

6. GRAVE DECORATING FLAGS.

a. At many VA National Cemeteries, each grave is decorated with a small United States of America flag on memorial Day. This practice will be continued at these cemeteries except where substitution of an Avenue of Flags is favored by the local veteran community and discontinuation would not impact negatively on NCA or the cemetery. Discontinuance of the practice of decorating graves with individual flags may be implemented only with the prior approval of the Deputy Under Secretary for Operations, and with the involvement of interested NCA offices and staff, such as the Office of Field Programs and NCA's Communications Management Service.

b. Grave decorating flags will be displayed only during the Memorial Day period each year. A Grave Decorating Flag Program is not required at newly constructed VA National Cemeteries or at cemeteries where display of the Avenue of Flags is the traditional method of displaying United

States of America flags on Memorial Day.

c. For decoration of the graves of Confederate veterans, refer to paragraph 7 below.

7. FLAGS OF THE FORMER CONFEDERATE STATES OF AMERICA

a. A flag of the former Confederate State of America (CSA), such as the Confederate battle flag, may be displayed in VA National Cemeteries only to honor the memory of those who served in the armies or navy of the CSA during the Civil War. Display of Confederate flags on NCA property is limited to displays by a sponsoring organization and to display on Memorial Day and Confederate Memorial Day (in cemeteries in those States that recognize a Confederate Memorial Day). In addition, in States that do not have a Confederate Memorial Day, display of the Confederate flag is authorized on one other day. That day shall be the "ceremonial day" previously recognized by NCA as the annual day when the Confederate flag may be displayed under the sponsorship of a historical or service organization to honor the memory of Confederate veterans interred in that facility. An organization that wishes to establish a ceremonial day in lieu of a Confederate Memorial Day, at a NCA facility where one does not already exist, must follow the process set out in paragraphs 2.b. and 7.c., and be granted permission under the applicable provision prior to conducting such a ceremony. Only one ceremonial day may be approved per facility. Once such a day is authorized, an organization that subsequently seeks involvement in displaying the

Confederate flag at that facility will be encouraged to contact the organization previously granted approval to display the Confederate flag on the ceremonial day to discuss possible participation in activities occurring on that day.

b. The confederate flag(s) will be displayed as follows:

(1) The VA National Cemeteries where Confederate veterans are interred in individual graves, small individual Confederate grave flags may be placed on each grave on the day(s) identified in paragraph 7.a.

(2) At VA National Cemeteries where Confederate veterans are buried in mass graves, the Confederate flag may be displayed on a separate flagpole that is subordinate to the main flagpole on the day(s) identified 7.a.

c. To permit broad participation on the two days identified in paragraph 7.a. display of a Confederate flag is permitted only under the sponsorship of a historical or service organization. Such display may occur only on the two days identified above, unless an exception has been granted as stated in paragraph 2.b. of this directive. To initiate a request to display the flag on either or both of the days identified in paragraph 7.a. the sponsoring historical or service organization must submit a request in writing thirty (30) days in advance of the proposed display, and provide details concerning the proposed display. The Cemetery Director will respond to the request within ten (10) working days of receipt of the request. Once initial display has been

approved, a Confederate flag may be displayed by the sponsoring organization on the approved day(s) on an annual basis.

d. Requests to permit the display of a Confederate flag on NCA property, on a one-time basis as part of an approved ceremony or special activity on days other than the two days identified in paragraph 7.a will be considered on an individual basis. Such request should be submitted in writing to the Cemetery Director for consideration at least thirty (30) days in advance of the proposed ceremony. The Cemetery Director will respond to such request with ten (10) working days upon receipt of the request. Guidance on ceremonies and special activities on NCA property is contained in NCA Manual M40-2, Chapter 11, dated May 1, 1984, or any superceding issuances.

e. The stock of Confederate flags used for display in VA National Cemeteries and on NCA property will be maintained through donation by the sponsoring organization. Confederate flags may not be purchased with Government funds. The sponsoring organization will supervise the placement and removal of Confederate flags without cost to the United States. The sponsoring organization is responsible for the storage of Confederate flags. However, the cemetery director may, as a courtesy to the sponsoring organization, agree to store such flags if space is available and their storage does not result in any additional burden or cost to NCA.

f. The Confederate battle flag may fly on a daily basis from 9 a.m. to 6 p.m. at Point Lookout Confederate Cemetery as

specified by the Order of the United States District Court for the District of Maryland, in Griffin v. Department of Veterans Affairs, et al., No. WMN 00-CV-2837 (Jan. 30, 2001). (Note: Appeal filed on March 28, 2001.) Consistent with that order, the flagpole, flag, maintenance, and the raising and lowering of the flag, are the responsibility of private parties.

8. THE NATIONAL LEAGUE OF FAMILIES POW/MIA FLAG

a. The National League of Families POW/MIA Flag (POW/MIA flag) is the congressionally designated symbol of the Nation's concern to resolve the fates of Americans taken prisoner, or missing in action, and who remain unaccounted for (36 U.S.C. Section 902(a)). See also Memorandum of the Secretary of Veterans Affairs on "Display of POW-MIA Flag," (July 23, 1998). As stated in 38 U.S.C. Section 902(b), the display of the POW/MIA flag on the days and locations specified by Congress serves two purposes:

(1) It serves as a symbol of the Nation's commitment to achieve the fullest possible accounting of Americans who, having been prisoners of war or missing in action, remain unaccounted for.

(2) It serves as the symbol of the Nation's commitment to achieve the fullest possible accounting of Americans who in the future may become prisoners of war, missing in action, or otherwise be unaccounted for as a result of hostile action.

b. In keeping with NCA's continuing mission of commemorating the service of the Nation's veterans, the POW/MIA flag will be flown daily at all VA National Cemeteries and other NCA property staffed by NCA personnel. At VA National Cemeteries and NCA property that are not daily staffed, the POW/MIA flag will be flown on the six days required under 36 U.S.C. Section 902(c). The six days are:

(1) Armed Forces Day, the third Saturday in May;
(2) Memorial Day, the last Monday in May;
(3) Flag Day, June 14;
(4) Independence Day, July 4;
(5) National POW/MIA Recognition Day (although this day is not defined in statute, it has traditionally been the third Friday in September); and
(6) Veterans Day, November 11.

c. Consistent with the requirement at 36 U.S.C. Section 902(f) that the POW/MIA flag "be displayed in a manner designed to ensure visibility to the public," the POW/MIA flag will be displayed on a separate flagpole erected in a location to exhibit appropriate respect for the flag unless circumstances make display on a separate flagpole impractical.

9. RESPONSIBILITIES

NCA, Office of Field Programs, will ensure that individual MSN Directors and VA National Cemetery Directors understand their responsibilities pertaining to display and handling of flags in VA

National Cemeteries.

10. REFERENCES

a. Title 4, United States Code, Federal Flag Code.

b. 36 U.S.C. Section 902, The National League of Families' POW/MIA Flag.

c. Public Law 103-308, National Pearl Harbor Remembrance Day.

d. 38 CFR 1.9, The Department of Veterans Affairs Official Seal and Distinguishing Flag.

e. 38 CFR 1.10, The United States Flag for Burial Purposes.

f. 38 CFR 1.218, Security and Law Enforcement at VA Facilities.

g. NCA Manual M40-2, Chapter 11 (May 1, 1984), Ceremonies and Special Activities, and any superceding issuances.

h. Memorandum of the Secretary of Veterans Affairs to Under Secretaries of Health, Director, National Cemetery System, and Assistant Secretary for Human Resources and Administration, "Display of POW-MIA Flag." (July 23, 1998).

C1

Department of Veterans Affairs
Washington, DC 20420

NCS Directive 3220
Transmittal Sheet
April 21, 1995

FLAGS IN VA NATIONAL CEMETERIES

1. REASON FOR ISSUE: To establish National Cemetery System (NCS) policy for displaying flags in VA national cemeteries.

2. SUMMARY OF CONTENTS: This directive prescribes policy related to the display, handling, storage and disposition of flags in national cemeteries.

3. RESPONSIBLE OFFICE: The Office of Field Operations (401), NCS, is responsible for the material contained in this directive. The cemetery directors are responsible for carrying out the procedures contained in the related handbook.

4. RELATED HANDBOOK: NCS Handbook 3220, Flags in VA National Cemeteries.

5. RESCISSIONS.

   a. NCS M40-2, National Cemeteries - Administration, Operation and Maintenance, dated May 1, 1984, paragraphs:

      (1) 3.05 - U.S. Flag and Cemetery Flag Pole

      (2) 6.07 - Interment Flag

(3) 11.04 - Memorial Day Grave Decorating Flags

(4) 11.09 - Avenue of Flags

(5) 22.12 - Issuance of United States Flags Authorized for Burial or Memorial Purposes

b. NCS Administrative Issues:

DMA Circular 40-79-03 - Issuance of United States Flag for Burial or Memorial Purposes, May 7, 1979

c. NCS Policy Letters:

(1) Quality Control of Interment Flags, October 1, 1990

(2) United States Flags in the National Cemetery System, July 1, 1991

(3) Flying of the POW/MIA Flag in National Cemeteries, July 6, 1992

(4) Display of the POW/MIA Flag in National Cemeteries, October 7, 1992

Jerry W. Bowen
Director, National Cemetery System

Distribution: RPC 4014
FD

USE OF FLAGS

1. FLAG ETIQUETTE AND DISPLAY

a. Respect will be demonstrated at all times for the United States flag, the VA's Distinguishing flag and other flags authorized for public display at national cemeteries through appropriate handling and storage, display and disposition in accordance with the Federal Flag Code (Public Law 94-344), title 38 United States Code, section 2403(c), and title 38, code of Federal Regulations, section 1.9 and 1.10.

b. Primary flags authorized for public display in national cemeteries are the United States flag, the VA's Distinguishing flag, State flags, the POW/MIA flag and, under limited circumstances, the Confederate flag.

c. Certain other flags, pennants and guidon banners may be displayed at the discretion of the Cemetery Director for special occasions so long as they are of an honorable military, civic or service symbolism. Examples of these are the Medal of Honor flag, the Buffalo Soldiers guidon, military ship and unit flags (often displayed at wreath laying ceremonies), Senior flag and General Officer flags (usually displayed during a visit), and flags commemorating certain national historic events.

d. Service Organization and Military Department flags may be appropriately displayed for special occasions. These flags may also be placed in the administration building, along

with the United States flag, as a static display.

e. Foreign National flags may be displayed under certain circumstances such as visitation by a Head-of-State. The graves of foreign prisoners of war may be decorated with their respective Foreign National Flag for authorized ceremonies conducted by their countrymen or government officials.

f. All flags, pennants and guidon banners will be displayed appropriately and always subordinate to the United States flag.

2. PRIMARY UNITED STATES FLAG

a. Each national cemetery will display an all-weather United States flag on the main flagpole each day of the year during the hours the cemetery is open, but not to exceed the hours of daylight. Cemeteries having an appropriately illuminated flagpole may display the flag during non-daylight hours so long as the flag is illuminated between the hours of sunset and sunrise.

b. Cemetery personnel will display the United States flag on Memorial Day at half staff until noon, at which time it will be raised to full staff. The flag may also be flown at half staff when otherwise authorized or by Presidential proclamation commemorate the death of distinguished citizens, or each December 7 in honor of the individuals who died as a result of their service at Pearl Harbor.

c. Cemetery personnel will bring the United States flag to half

staff one-half hour before the start of the first committal service and raise it to full staff one-half hour after the conclusion of the last committal service each day.

d. No other flag will be routinely displayed subordinate to (below) the United States flag on the main flagpole.

3. MEMORIAL FLAGS

a. 38 CFR 1.10 governs eligibility for and disposition of the United States flag for burial purposes. General information related to memorial flags is found in VA Pamphlet 27-75-1, United States Flag for Burial or Memorial Purposes.

b. Cemetery Directors should ensure that each casket and urn containing the remains of an eligible veteran delivered to a national cemetery for burial is accompanied by an appropriately displayed United States flag, unless the primary next of kin or, if none, the party responsible for the burial wishes otherwise.

c. Memorial flags may be obtained by next of kin on behalf of eligible veterans through application using VA Form 2008, Application for United States Flag for Burial Purposes. Memorial flags are issued by VA facilities, including national cemeteries, and most U.S. post offices. Each national cemetery should maintain an adequate supply of VA Forms 2008, for use by the public in applying for the issuance of a memorial flag.

d. Each national cemetery will maintain a supply of memorial flags which is adequate to meet its needs. Order memorial

flags (VA Stock Number 8345-00-656-1432) through established supply channels using VA Form 90-2237, Request, Turn-in and Receipt for Property or Services. Memorial flags are issued in accordance with guidance provided in VA Pamphlet 27-75-1, and their distribution is accountable.

e. Usually, remains arriving at the cemetery for burial are accompanied by a memorial flag. When remains arrive at the cemetery unaccompanied by a memorial flag, and the responsible party desires a flag, it will be issued by the national cemetery upon application. When remains of deceased active duty military personnel are consigned directly to the cemetery, but were inadvertently shipped without an accompanying memorial flag, the cemetery will provide a flag without application.

f. Cemetery personnel will inspect all memorial flags that accompany remains to assure that they are free of defects. Defective flags will be replaced with cemetery stock and turned in through established supply procedures for stock replenishment.

g. Cemetery personnel will assure that the memorial flag which drapes a casket or is displayed with an urn containing cremated remains is displayed in accordance with the flag code and appropriately presented.

4. AVENUE OF FLAGS

a. An Avenue of Flags is the flying of many United States flags usually arrayed on both sides of the principal drive

leading from the main entrance into the cemetery. In newly constructed national cemeteries and other cemeteries where appropriate, the Avenue of Flags is the primary display of respect for the service performed by our Nation's veterans, and replaces the decorating of individual graves with flags on Memorial Day.

b. United States flags used in the Avenue of Flags are memorial flags issued to honor deceased veterans which are then donated by the next of kin to the cemetery for display. Cemetery Directors must make it clear to the donor that these flags become the property of VA, and that the donation is unconditional. Loaned flags or new memorial flags drawn from stock will not be used for display in the Avenue of Flags. The extent of the Avenue of Flags at each cemetery is determined by the number of serviceable memorial flags available, and the program scope that can be readily managed by the cemetery's staff.

c. When a memorial flag donations has been accepted, the donor will be presented a prepared VA Form 40-4998, Certificate of Appreciation (Avenue of Flags Program), by the Cemetery Director. This certificate should be prepared in a manner which renders it suitable for presentation and display. When practical, the certificate should be presented in person. When this is not practical, the certificate should be mailed to the donor along with an appropriate, but brief, cover letter signed by the Cemetery Director. The certificate and letter should be packaged in a manner that offers protection from damage during shipment.

d. Where Avenues of Flags are authorized and implemented, they are displayed on Memorial Day, Veterans Day and other appropriate special occasions such as Flag Day and Independence Day when weather permits. The wishes of local service and civic organizations are considered in determining on which special occasions to display the Avenue of Flags.

e. To the extent that it can be promoted, the Avenue of Flags will be supplied, installed, maintained, erected and taken down through voluntary donation of time and labor by local service and civic organizations, school groups and other interested parties.

f. Flag staffs used to display the Avenue of Flags will be sufficient in size and strength to adequately and appropriately display a standard memorial flag. Flag staffs are secured by insertion into an in-ground receptacle, usually spaced about 20 feet apart (6m), so passing vehicles or pedestrians cannot interfere with the flag.

5. GRAVE DECORATING FLAGS

a. At many national cemeteries, each grave is decorated with a small United States flag on Memorial Day. This practice will be continued at these cemeteries except where substitution of an Avenue of Flags is strongly favored by the local veteran community, and where discontinuation would not impact negatively on the National Cemetery System (NCS). Efforts to discontinue the practice of decorating graves with individual flags may be initiated only with the prior approval of the Director, Office of Field

Operations, and with the direct involvement of Field Programs and Public and Consumer Affairs Service staffs.

b. Grave decorating flags will be displayed only on Memorial Day each year. A Grave Decorating Flag Program will not be implemented at newly constructed national cemeteries or at cemeteries where display of the Avenue of Flags is the traditional method of arraying United States flags on Memorial Day.

c. United States flags used to decorate graves are acquired at Government expense through established procurement procedures. Cemetery Directors will maintain an adequate stock of serviceable flags to decorate graves in the cemetery. It is important that these flags are protected from damage and properly stored to maximize their useful life.

d. Flags will be placed on graves in a uniform manner, usually 1 foot (.304 m) in front of and centered on the headstone or marker. When required by the number of graves to be decorated and available labor, graves may be decorated the day before Memorial Day and flags removed the day after Memorial Day. This will result in illuminated flags in place during non-daylight hours; however, this is an authorized deviation from the flag code made necessary by logistics.

e. Cemetery Directors will actively promote voluntary assistance from local service and civil organizations, Boy and Girl Scouts, other groups, and interested citizens in placing and removing grave decorating flags. Volunteers

will be supervised to the extent possible to assure that flags are treated with dignity and respect, and are properly placed. Cemetery personnel will accomplish flag related work that cannot be done with volunteer assistance.

f. After removal and before storage, flags will be inspected, dried, if necessary, and culled to remove those that are unserviceable. Unserviceable flags will be disposed of appropriately. After inventorying serviceable flags, replacements will be ordered to assure that an adequate supply of flags will be on hand when needed. Flags will be stored in a dignified manner out of public view.

6. THE FLAG OF THE CONFEDERATE STATES OF AMERICA (CSA)

a. The flag of the Confederate States of America (CSA) will be displayed in national cemeteries only to represent respect for those decedents who served in the armies of the CSA during the Civil War. As such, the display of the Confederate flag is limited to small individual grave flags arrayed on Memorial Day and, in States where it is officially observed, Confederate Memorial Day.

b. The display of the Confederate flag in national cemeteries is allowed only under the sponsorship of a local service or historic organization. The stock of Confederate flags for display in national cemeteries will be maintained through donation by the sponsoring organization. Confederate flags may not be purchased with Government funds. On occasions when they are displayed, Confederate flags will be placed and removed with volunteer labor organized,

provided and supervised by the sponsoring organization.

c. The Confederate flag is to be subordinate to the United States flag in size and prominence of display. When displayed on graves in conjunction with the United States flag on Memorial Day, Confederate flags are placed 3 feet (.914 m) in front of and centered on the headstone of deceased Confederate veterans. When displayed without he presence of the United States flag, as may be done on Confederate Memorial Day, the Confederate flag is placed 1 foot (.304 m) in front of and centered on the headstone of deceased Confederate veterans.

7. THE LEAGUE OF FAMILIES' POW/MIA FLAG

a. The official League of Families' POW/MIA flag is authorized for display in national cemeteries. The POW/MIA flag is displayed during daylight hours at all national cemeteries on memorial Day, Veterans Day, and National POW/MIA Recognition Day. The flag may be flown more frequently, or daily, at cemeteries where its display is promoted and supported by local interest groups.

b. The POW/MIA flag is not displayed subordinate to the United States flag on the cemetery's main flag pole. It is displayed on a separate flag pole erected in a location to exhibit appropriate respect for the flag.

c. When displayed only on mandatory occasions, the POW/MIA flag may be flown from a flag staff similar to those used in Avenues of Flags. At cemeteries where local interest has promoted more frequent or daily display of the

POW/MIA flag, a permanent flagpole dedicated solely to that use may be installed. Local interest groups and organizations are encouraged to provide input on their preferred location of this flagpole on cemetery grounds however, the Cemetery Director, in coordination with the NCAO Director, will make the final decision on its location.

THE FLAG OF THE CONFEDERATE STATES OF AMERICA

Federal laws regulate display of non-United States flags. The flag policy of the National Cemetery Administration (NCA) is based on title 38, Code of Federal Regulations, section 1.218(a)(14)(ii), and fosters respect for an individual veteran's service to Our Country by maintaining consistency across NCA.

The flag of the Confederate States of America (CSA) is displayed at VA national cemeteries out of respect for those decedents who served in the CSA Army or Navy during the Civil War.

The Confederate flag is always subordinate to the United States flag in size and prominence of display.

Display of the Confederate flag is limited to Memorial Day, Confederate Memorial Day, or the day a State memorializes Confederate decedents.

The display of Confederate flags at VA national cemeteries is allowed only under the sponsorship of a local service or historic organization. The flags will be maintained through donation by the sponsoring organization and may not be purchased with Government funds. Flags will be placed and removed with volunteer labor organized, provided, and supervised by the sponsoring organization.

At VA national cemeteries where Confederates are buried in individual graves, small individual Confederate gravesite

flags may be placed on each grave on authorized days.

At VA national cemeteries where Confederates are buried in mass graves, the Confederate flag will be displayed on a separate flag pole that is subordinate to the main flag pole on authorized days.

Confederate flags are placed three feet in front of and centered on the headstones of deceased Confederate veterans when displayed with the United States flag on Memorial Day.

Confederate flags are placed one foot in front of, and centered on, the headstone of deceased Confederate veterans when displayed without the presence of the United States flag, which may be done on Confederate Memorial Day.

National Cemetery Administration
May 1999

(2)

Supreme Court, U.S.
FILED
SEP 12 2002
CLERK

No. 01-1782

In the Supreme Court of the United States

PATRICK J. GRIFFIN, III, PETITIONER

v.

SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Pursuant to 38 C.F.R. 1.218(a)(14), the Department of Veterans Affairs (VA) regulates activities and demonstrations including the display of flags in national cemeteries and other property administered by the VA. The question presented is whether the court of appeals properly rejected petitioner's facial challenge to the constitutionality of Section 1.218(a)(14).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A43) is reported at 288 F.3d 1309.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2002. The petition for a writ of certiorari was filed on May 31, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. National cemeteries are under the authority of the National Cemetery Administration (NCA) within

the Department of Veterans Affairs (VA). 38 U.S.C. 2400(b), 2403(c). NCA oversees 120 national cemeteries across America comprising more than 13,000 acres. The cemeteries are to be maintained as "national shrines as a tribute to our gallant dead." 38 U.S.C. 2403(c). Consistent with that statutory mandate, Congress has authorized the Secretary of Veterans Affairs to "permit appropriate officials to fly the flag of the United States of America at such cemeteries twenty-four hours each day." 38 U.S.C. 2403(c); see 4 U.S.C. 6.

The Secretary of Veterans Affairs is "authorized to make all rules and regulations which are necessary or appropriate" to administer national cemeteries and memorials under the VA's jurisdiction. 38 U.S.C. 2404(a). The Secretary has delegated this authority to the Under Secretary for Memorial Affairs, who heads NCA (formerly the Director of the National Cemetery System (NCS)). 38 C.F.R. 2.6(f); see 38 U.S.C. 512, 2400(a) (authority for delegation); National Cemeteries Act of 1973, Pub. L. No. 93-43, § 6(a)(1), 87 Stat. 81 (Director of NCS under prior law).

The VA's regulations include a general provision on "Security and law enforcement at VA facilities," which applies to "all property under the charge and control of VA," including national cemeteries and VA hospitals, clinics, and offices. 38 C.F.R. 1.218(a). Section 1.218(a)(14) provides in part:

> (i) All visitors are expected to observe proper standards of decorum and decency while on VA property. Toward this end, any service, ceremony, or demonstration, except as authorized by the head of the facility or designee, is prohibited. * * *
>
> (ii) For the purpose of the prohibition expressed in this paragraph, unauthorized demonstrations or

> services shall be defined as, but not limited to * * * the display of any placards, banners, or foreign flags on VA property unless approved by the head of the facility or designee * * * .

38 C.F.R. 1.218(a)(14).

In addition, the VA has issued directives on the display of flags in national cemeteries. In 1995, the VA issued a Directive and Handbook (Pet. App. C1-C12) providing interpretive guidance on Section 1.218(a)(14) with respect to the display of flags in national cemeteries. Among other things, that guidance authorized the display of the Confederate flag in national cemeteries where Confederate soldiers and sailors are interred on only two days a year, Memorial Day and, in States where it is observed, Confederate Memorial Day. See *id.* at C10-C11, C13. In April 2001, the VA issued a new directive on the display of flags which contains the same basic criteria concerning the display of Confederate flags in national cemeteries. *Id.* at B1-B14; see *id.* at B9-B12.

Individuals may request approval from the NCA to deviate from the policy expressed in its directive in particular cases. Pet. App. B4. Such requests must be approved or denied by the NCA's Deputy Under Secretary for Operations within five business days following their receipt by that official. *Ibid.*

2. Petitioner is a member of the organization Sons of Confederate Veterans and a descendant of a Confederate soldier imprisoned at Point Lookout Confederate Cemetery (Point Lookout), a national cemetery located in St. Mary's County, Maryland. During the Civil War, the federal government established a prisoner of war camp at Point Lookout for captured Confederate soldiers. Many prisoners died in captivity, and

approximately 3300 are buried in a mass grave at the site. Pet. App. A2-A3. Although the VA regulations discussed above restricting the display of flags applied to Point Lookout, a Confederate flag was flown on a daily basis from 1994 to May 1998 at Point Lookout based "on the unauthorized personal initiative of a VA employee." *Id.* at A3.

After the flag was removed in 1998, petitioner requested permission from the VA to erect a flagpole and display the Confederate flag on a daily basis at Point Lookout. That request was denied. Petitioner then filed suit against the VA in the District Court for the District of Maryland, claiming that 38 C.F.R. 1.218(a)(14) and the VA's directive on the display of flags are unconstitutional both on their face and as applied to him. In January 2001, the district court ruled that the VA's regulation is unconstitutional as applied, but held that the court lacked jurisdiction to consider petitioner's facial challenge. As the court explained, pursuant to 38 U.S.C. 502, the Federal Circuit has exclusive jurisdiction over such a facial claim. Pet. App. A5-A6; see *Griffin* v. *Department of Veterans Affairs*, 129 F. Supp. 2d 832 (D. Md.), rev'd, 274 F.3d 818 (4th Cir. 2001), petition for cert. pending, No. 01-1687 (filed May 13, 2002).

The Court of Appeals for the Fourth Circuit reversed. With respect to petitioner's as-applied claim, the court held that Point Lookout is a nonpublic forum, and that the VA's regulation of the display of the Confederate flag in that forum is permissible because it is both reasonable in light of the purpose of the forum—to honor the soldiers buried there as "Americans, not as Confederates"—and is viewpoint neutral. Pet. App. A7; see *Griffin*, 274 F.3d at 822-823. With respect to the facial claim, the court expressed skepticism that it

had jurisdiction to consider that claim under 38 U.S.C. 502, but concluded that the claim lacked merit in any event. *Id.* at 824. Petitioner filed a petition for a writ of certiorari (No. 01-1687) from that decision.[1]

3. After the district court's decision in the Maryland action, petitioner filed a petition for review of 38 C.F.R. 1.218(a)(14) in the Court of Appeals for the Federal Circuit, alleging that the regulation violates the First Amendment on its face. Pet. App. A1. Specifically, petitioner argued that Section 1.218(a)(14) is unconstitutional in all its applications because, he claimed, it vests too much discretion in the VA, lacks sufficient procedural safeguards, and is unduly vague. Pet. App. A1. The Federal Circuit concluded that it had jurisdiction to review that challenge to the regulation under 38 U.S.C. 502, and held that petitioner failed to meet the "'heavy burden' imposed on those seeking to invalidate a law on its face." *Id.* at A1-A2, A8, A30.

a. The court first rejected petitioner's argument that Section 1.218(a)(14) establishes "an unconstitutional standardless licensing scheme." Pet. App. A13. "To determine whether section 1.218(a)(14) violates the First Amendment as a standardless licensing scheme," the court looked to "whether the discretionary power granted to VA officials by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries." *Id.* at A21. National cemeteries, the court found, are nonpublic fora, in which government officials have traditionally enjoyed "greater latitude" in regulating speech than in public fora.

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[1] The lower court decisions in petitioner's initial action are discussed in more detail in the government's brief in opposition to petitioner's petition for certiorari in that case.

Ibid.; see *ibid.* (discussing *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985)).

Moreover, the court continued, "the government has established national cemeteries to serve particular commemorative and expressive roles," *i.e.*, to serve as "national shrines" to those dead who have served in the Armed Forces. Pet. App. A23 (quoting 38 U.S.C. 2403(c)). At the same time, the court recognized, "[n]ational cemeteries also serve important expressive functions for the government," which "heightens the discretion to be afforded to facility administrators." *Id.* at A23-A24. The court emphasized that "[t]he nature and function of the national cemetery make the preservation of dignity and decorum a paramount concern," and it concluded that "the discretion vested in VA administrators by section 1.218(a)(14) is reasonable in light of the characteristic nature and function of national cemeteries." *Id.* at A25-A26.

The court rejected the notion that the discretion granted to VA officials creates "a real and substantial threat to expression" in national cemeteries. Pet. App. A26. Indeed, as the court explained, "at least since 1995, the discretion of VA administrators has been constrained (although not eliminated) by the VA's detailed Flag Manual," whereby the VA has established "a consistent VA policy on flag display." *Id.* at A27. Moreover, the court stated, "the record before us suggests that VA flag display policy has left little room for arbitrary or discriminatory enforcement by individual cemetery officials." *Id.* at A28.

The court "acknowledge[d] the theoretical possibility that the VA might exercise its power to grant exceptions in order to favor only those orations or demonstrations that are to the government's liking," but it refused to hold "that this possibility alone justifies the

drastic remedy of facial invalidation." Pet. App. A29. Instead, the court reasoned, drawing support from this Court's decision in *Thomas* v. *Chicago Park Dist.*, 122 S. Ct. 775 (2002), "as-applied challenges to particular acts of [alleged] viewpoint discrimination are a more appropriate means to ensure that VA facility heads do not wield their power to grant exceptions arbitrarily or unreasonably." Pet. App. A29-A30.[2]

b. The court next rejected the argument that Section 1.218(a)(14) is unconstitutional for want of adequate procedural safeguards. Pet. App. A31. The court stated that it was aware of "no case demanding procedural safeguards as an independent requirement in a nonpublic forum." *Id.* at A31-A32. Instead, the court noted, the cases that have required added procedures have involved challenges to "an explicit censorship scheme—which by definition is not content-neutral." *Id.* at A31 (citing *Thomas*, 122 S. Ct. at 779-780). In any event, the court observed, the VA's directive on the display of flags in national cemeteries establishes time limits for administrative decisionmaking, and petitioner "has not shown that imposing additional procedural requirements on the VA's decision-making process would materially advance First Amendment interests." *Id.* at A32.

c. Finally, the court held that Section 1.218(a)(14) is not unconstitutionally vague. Pet. App. A36. The court

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[2] Similarly, the court emphasized that petitioner did not show that the regulation would substantially chill any speech *outside of* national cemeteries, to which the challenged regulation also applies. Pet. App. A27. Without evidence that the regulation impacted speech at other VA property, there was "little reason," the court noted, to find that the regulation "reached a substantial number of impermissible applications." *Ibid.* (quoting *New York* v. *Ferber*, 458 U.S. 747, 771 (1982)).

doubted petitioner's standing to bring his vagueness claim on the ground that he has not shown any injury from the allegedly vague parts of the regulation—*i.e.*, the terms "oration," "assembled groups of people," and "partisan activity." *Id.* at A33. In any event, even assuming such standing existed, the court held that petitioner failed to show that anyone has ever been penalized pursuant to these parts of the regulation, that the allegedly vague sections "significantly limit speech by third parties not before the court," or that a person of ordinary intelligence would not be able to determine what is regulated. *Id.* at A34-A35.

d. Judge Dyk concurred in part and dissented in part. Pet. App. A37-A43. He "agree[d] with the majority's well-reasoned rejection of [petitioner's] claim that section 1.218(a)(14) of the VA regulations is facially unconstitutional insofar as it regulates the flying of flags in VA cemeteries." *Id.* at A37. But he argued that there was no occasion for the court to consider petitioner's challenge to Section 1.218(a)(14) to the extent it applies to other property administered by the VA, because petitioner lacked standing to challenge any aspect of the regulations not "relating to the flying of flags in VA cemeteries." *Id.* at A42.

ARGUMENT

As this Court has emphasized, "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)). The court of appeals in this case properly held that petitioner failed to meet the "heavy burden" (Pet. App. A30) necessary to show that 38 C.F.R. 1.218(a)(14) is unconstitutional on its face. Its

decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly rejected the argument that the discretion left to VA officials by Section 1.218(a)(14) and the directive on the display of flags in national cemeteries requires facial invalidation of the VA's rule. Petitioner has not pointed to any authority calling for a different result.

a. As the court of appeals explained, the discretion granted to VA officials under the regulatory scheme at issue is scarcely unfettered. Pet. App. A27-A28. In particular, the VA's directive on flag displays in national cemeteries establishes both criteria governing the approval of flag display requests and time limits on the administrative review of such requests, and thus in fact leaves "little room" for viewpoint discrimination. *Id.* at A28; see *ibid.* ("[T]he current directive provides multiple examples that delineate what kinds of displays are permissible, and the directive requires, at least in theory, that any flag 'not promote any particular viewpoint or ideology.'"). The fact that the directive contains "[a] limited exception 'for special occasions' does not negate the constraining effect of the [VA's flag directive]." *Ibid.*

In any event, contrary to petitioner's suggestion (at 16), this Court has not held that a grant of broad discretion to government officials to regulate speech in nonpublic fora is unreasonable. Rather, the Court's "unbridled discretion" decisions have dealt with speech in *public* fora, where government officials traditionally enjoy much less discretion to regulate speech or expressive conduct than in nonpublic fora. See, *e.g.*, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969) (parades or demonstrations in streets and thorough-

fares); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 769-770 (1988) (newsracks along city streets and thoroughfares).

The contention that *Shuttlesworth* or *City of Lakewood* governs the regulation of expressive activity in national cemeteries ignores the baseline established by forum analysis. In *Cornelius*, for example, the Court upheld the content-based exclusion of the NAACP Legal Defense and Educational Fund from a federal employee charity drive—a nonpublic forum—explaining that the Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." 473 U.S. at 800. As the court of appeals recognized, the character of the forum is crucial in determining the degree of latitude that may be exercised by government officials in regulating speech. See Pet. App. A23.

Petitioner fails to account for the greater leeway that the First Amendment leaves to government officials with respect to nonpublic fora. As this Court has repeatedly recognized, restriction of speech in a nonpublic forum is valid as long as it is reasonable and viewpoint neutral. See, *e.g.*, *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677-678 (1998); *United States* v. *Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion) (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)); see also *id.* at 730 ("[t]he Government's decision to restrict access to a nonpublic forum need only be *reasonable*") (quoting *Cornelius*, 473 U.S. at 808). Accordingly, in *Cornelius*, this Court differentiated nonpublic fora from those in which regulation is "merely ministerial." 473 U.S. at 804.

The court of appeals in this case thus correctly recognized that "[s]electivity and discretion are some of the defining characteristics of the nonpublic forum," and concluded that "the fact that discretionary access is a defining characteristic of the nonpublic forum should suggest that more official discretion is permissible" in the regulation of national cemeteries than in the regulation of public fora. Pet. App. A22. The undeniably *non*public nature of the forum in this case—national cemeteries that Congress has declared to be "national shrines as a tribute to our gallant [war] dead," 38 U.S.C. 2403(c)—makes this case a particularly unsuited vehicle for review of petitioner's generalized theories about the forum doctrine. And that is especially true in the context of petitioner's desire to engage in expressive conduct involving installation of a display that would be seen by others who visit Point Lookout even in his absence.

The Federal Circuit's reliance on the reasonableness standard applied by this Court itself in nonpublic forum cases such as *Cornelius* also is consistent with the case law in other circuits. See, *e.g.*, *Muller* v. *Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1542 (7th Cir. 1996), cert. denied, 520 U.S. 1156 (1997). In *Muller*, the court of appeals, applying a reasonableness standard, rejected the argument that a school district rule allowing educators to prohibit distribution of certain nonschool materials unconstitutionally granted excessive discretion to school officials. In so holding, the court was sensitive to the context in which the speech at issue took place. See *id.* at 1543.

b. The court of appeals also correctly held that the discretion that may be exercised by VA officials under 38 C.F.R. 1.218(a)(14) does not pose any real and substantial risk to protected speech. Pet. App. A26-A29.

That determination in no way conflicts with this Court's decision in *City of Lakewood*, where the Court held that such a threat was posed by an ordinance "vest[ing] the mayor with unbridled discretion over which publishers may place newsracks on public property and where." 486 U.S. at 753.

As the court of appeals recognized, any restriction of expression in the nonpublic forum at issue in this case "does not pose the same threats to expression identified by *City of Lakewood* in licensing schemes that restrict newspapers or other media in the public forum [in that case]." Pet. App. A22. In *City of Lakewood*, the challenged ordinance gave the mayor the virtually complete discretion to "decide who may speak and who may not based upon the content of the speech or viewpoint." *City of Lakewood*, 486 U.S. at 763. In contrast, the "record" in this case, the court below found, establishes that the regulation at issue "has left little room for arbitrary or discriminatory enforcement." Pet. App. A28.

This Court has stated that facial challenges to standardless licensing schemes may be necessary to prevent viewpoint discrimination, given the risk of self-censorship by those subject to such regimes. *City of Lakewood*, 486 U.S. at 757-758. But to bring such a challenge, *City of Lakewood* also requires a plaintiff to establish "a real and substantial threat" to the speech at issue. *Id.* at 759. As the court of appeals concluded, the challenged regulation in this case poses no such threat, see Pet. App. A26-A29, and the "theoretical possibility" of such a threat is insufficient to justify "the drastic remedy of facial invalidation." *Id.* at A29. As a result, "as-applied challenges to particular acts of viewpoint discrimination are a more appropriate means to ensure that VA facility heads do not wield their power

to grant exceptions arbitrarily or unreasonably." *Id.* at A29-A30.[3]

c. Nor does the decision below conflict with decisions from other courts reviewing licensing schemes in nonpublic fora. None of the cases relied upon by petitioner invalidated schemes in which administrative discretion was subjected to anything approaching the "constraining effect" (Pet. App. A28) of the VA's directive on the display of flags in national cemeteries. In *Atlanta Journal & Constitution USA* v. *City of Atlanta Department of Aviation*, 277 F.3d 1322, 1329, opinion vacated, 298 F.3d 1251 (11th Cir. 2002) (emphasis added), for example, the regulatory "plan permit[ted] the Department to cancel a publisher's [newsrack] license for *any reason whatsoever*, including unconstitutional reasons such as viewpoint discrimination." Likewise, in *Sentinel Communications Co.* v. *Watts*, 936 F.2d 1189, 1193 (11th Cir. 1991), the per-

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[3] Petitioner claims that the mere fact that criminal penalties are potentially available under the regulatory scheme at issue in itself makes the threat to speech substantial. This Court has stated that "a law imposing criminal penalties on protected speech is a stark example of speech suppression." *Ashcroft* v. *Free Speech Coalition*, 122 S. Ct. 1389, 1398 (2002). But it has not allowed the mere possibility of such penalties to substitute for the requirement of a substantial threat to protected speech. The Court in *Free Speech Coalition* still required that "a substantial amount of protected speech [be] prohibited or chilled in the process" for a child pornography statute to be facially unconstitutional for overbreadth. *Id.* at 1395. Nothing in the record in this case suggests that criminal sanctions pose a real or substantial threat to protected speech; indeed, as the court of appeals noted, there is "no indication * * * that the VA has ever penalized a speaker for unauthorized orations or partisan activity on VA property." Pet. App. A34.

mitting official stated that he did not follow any written guidelines in granting permission to install a newsrack.

In *Lewis* v. *Wilson*, 253 F.3d 1077 (8th Cir. 2001), cert. denied, 122 S. Ct. 1536 (2002), the "statute simply authorize[d] the [Missouri Department of Revenue] to reject license plates bearing messages that are 'contrary to public policy,' language that gives the DOR nearly unfettered discretion in choosing what license plates should be rejected and in deciding what alleged 'public policy' supports its decision." *Id.* at 1080. Furthermore, the revenue officials applied the statute in an inconsistent manner, changing the reasoning behind their refusal to allow the word "Aryan" on a license plate. *Ibid.* And, in *DeBoer* v. *Village of Oak Park*, 267 F.3d 558, 573 (7th Cir. 2001), the provision at issue, which governed access to a local meeting hall, "provide[d] no concrete standards or guideposts by which Village officials can gauge whether an event satisfies this precondition to the exercise of First Amendment rights."

In this case, by contrast, there are clear written guidelines governing the display of flags in national cemeteries, and the record confirms that those guidelines have protected against "arbitrary or discriminatory enforcement by [government] officials." Pet. App. A28; see *City of Lakewood*, 486 U.S. at 770 (binding administrative construction, or a well-understood and uniformly applied practice, may set limits on official discretion that are otherwise not apparent from the face of a challenged regulation); *United States* v. *Kalb*, 234 F.3d 827, 835 (3d Cir. 2000) (same), cert. denied, 122 S. Ct. 918 (2002); *United States* v. *Linick*, 195 F.3d 538, 542 (9th Cir. 1999) (same). The sole exception pointed to by petitioner involves the prior *unauthorized* display of the Confederate flag at Point Lookout.

2. The court of appeals' conclusion that the regulatory scheme at issue contains sufficient procedural safeguards to withstand a facial challenge to its constitutionality also does not merit further review. As the court of appeals recognized, the VA's directive is not without procedural safeguards; it "requires the [VA] to approve or deny exceptions to the flag policy within five business days." Pet. App. A32. Moreover, this Court has ruled that even in the absence of established procedures, it is constitutional to exclude speakers from nonpublic fora on reasonable and viewpoint neutral grounds. See, *e.g.*, *Forbes*, 523 U.S. at 682.

The Court has primarily required procedural safeguards "when a State undertakes to shield the public from certain kinds of expression it has labeled as offensive." *M.I.C., Ltd.* v. *Bedford Township*, 463 U.S. 1341, 1343 (1983); see *Thomas*, 122 S. Ct. at 779. The cases that petitioner cites involve censorship in public fora. See *Bedford Township*, *supra* (censorship of motels classified as sexually oriented businesses without procedural safeguards was unconstitutional); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (censorship of motion pictures without procedural safeguards was unconstitutional). In contrast, this case involves the content-neutral regulation of speech in what all agree is a nonpublic forum—national cemeteries created by Congress for the limited and honorable objective of honoring "our gallant [war] dead" as Americans. 38 U.S.C. 2403(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-1782

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. GRIFFIN, III,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE PETITION SQUARELY PRESENTS THE "UNLIMITED DISCRETION" ISSUE.

Title 38 C.F.R. § 1.218(a)(14) "sets no explicit limit on the discretion of VA officials to permit exceptions" to the section's blanket speech prohibitions. *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002). The court concluded, *id.* at 1326-1327 (Pet. App. A27-28) and the Solicitor General argues (Brief in Opposition ("Opp.") at 9) that the 1995 and 2001 flag manuals issued by the Department of Veterans Affairs ("VA") limit the VA's discretion and leave "little room for arbitrary or discriminatory enforcement."

The flag manuals, however, do not save § 1.218(a)(14). The manuals have no effect on VA discretion with respect to verbal expression or other forms of non-flag speech. Petitioners' facial challenge to § 1.218(a)(14) includes verbal speech. With respect to all forms speech other than flag display, § 1.218(a)(14) sets no limits on official discretion. (*See* Pet. App. A20.) The issue of whether such standards are required in a nonpublic forum thus is squarely presented, regardless of any effect the flag manuals may have in curbing official discretion with respect to flag display.

Moreover, the manuals do not constrain VA discretion. Paragraph 2a. of the VA's New Flag Manual ("NFM") of April 30, 2001 (Pet. App. D.) states the VA's general policy applicable to *all* flag display:

> [F]lags *may not be displayed* on NCA property as a means for political activity or similar conduct that *promotes*

any viewpoint or ideology other than to commemorate military service.

(Emphasis added) (Pet. App. at B3-4) This policy empowers VA officials to interpret a flag display and prohibit it based on the viewpoint(s) the official subjectively attributes to the flag. A flag is "[p]regnant with expressive content," and thus can express a variety of viewpoints. *Texas v. Johnson*, 491 U.S. 397, 405 (1989). "A [VA] official with even marginal creative ability" therefore "could frequently invent a ['viewpoint or ideology'] basis for rejecting a [flag display]... which he or she [finds objectionable]." *Lewis v. Wilson*, 253 F.3d 1077, 1081 (8th Cir. 2001), *cert. den. sub nom. Fischer v. Lewis*, 122 S. Ct. 1536 (2002) (statute that allowed officials to deny personalized license plate if message was "contrary to public policy" unconstitutional); *see also United Food & Commercial Workers v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341, 360 (6th Cir. 1998) ("aesthetically pleasing" speech requirement presented "danger of arbitrary and discriminatory application that violates the basic principles of due process"). For example, a VA official could decide that display of a Confederate flag does not merely honor Confederate soldiers but also honors the Confederate cause. Under ¶ 2a., the official could prohibit the display on the grounds that, in his subjective opinion, it expressed a forbidden viewpoint. The ability to prohibit speech on the basis of a subjective interpretation of symbolic speech is the exercise of an unlimited official discretion.

Further, the VA's policy statement *expressly mandates viewpoint discrimination*. The whole purpose of official scrutiny under ¶ 2a. is to determine whether a proposed display is intended to promote a disfavored "viewpoint or ideology...." Viewpoint-based scrutiny of speech, however, violates the Frist Amendment.

Rosenberger v. Univ. of Virginia, 515 U.S. 819, 829 (1995). Certainly it would be a novel result for government to "narrow" official discretion by "specifying" the viewpoints government officials may suppress. Neither the Federal Circuit nor the Solicitor mentions this overarching VA policy, which applies to all flag display in VA cemeteries. Paragraph 2a. alone removes any "constraining effect" of the NFM on VA discretion.

Other provisions of the NFM exhibit the same defects. Paragraph 2d. (Pet. App. B5) provides that "[c]ertain other flags" may be displayed (1) "on special occasions," provided they (2) "are not intended to promote any particular viewpoint or ideology other than the wish to commemorate military service." It then lists some examples. According to the Federal Circuit, this level of discretion is constitutional. *Griffin*, 288 F.3d at 1327. (Pet App. A28.) But the court cites no authority for this proposition. There is none. A determination of the "specialness" of an occasion involves unbridled discretion. Is George Washington's birthday a special occasion? Is the anniversary of the Battle of Antietam "special"? Is the annual reunion of the descendants of a deceased soldier "special"? "Specialness" is both subjective and vague, which are hallmarks of unbridled discretion. Moreover, aspect (2) of ¶ 2d. not only mandates viewpoint discrimination, but requires VA officials to go a step further and examine the expressive "intent" behind a proposed flag display. Speculation as to the speaker's intent, especially when employed to ferret out disfavored viewpoints, can only be described as a blatant form of unlimited official discretion. That such wide-open discretion bothered the Federal Circuit not at all is troubling indeed.

While space limitations prohibit a full discussion of the NFM, other provisions confer unlimited discretion on VA officials. *See* ¶¶

2f. , 2g., 7a., 7c., ¶ 7d. The NFM thus is full of provisions that either (1) permit VA officials to deny permission to display a disfavored flag on the basis of vague, subjective and explicitly viewpoint-based criteria, or (2) prescribe no standards at to guide official discretion. With respect to flag display, this case therefore raises the issue of whether speech regulations that confer unlimited discretion on government officials are constitutional in a nonpublic forum.

According to the Federal Circuit, "no Supreme Court case has suggested that the [unbridled discretion] is applicable outside the setting of a public forum." 288 F.3d at 1321, 1322. The Solicitor argues (Opp.at 9) that all "the Court's 'unbridled discretion' decisions have dealt with speech in *public* fora...." If the Solicitor is right, that is a compelling argument for review. The rule against unbridled discretion is one of the major protections the First Amendment affords to speech. Whether this protection applies in a nonpublic forum is a critical issue. The Solicitor thus makes a strong argument in support of granting review in this case.

Petitioners believe that in *Board of Airport Comm. v. Jews for Jesus*, 482 U.S. 569, 576 (1987), the Court applied a principle akin, if not identical, to *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969) in rejecting the airport commission's attempt to limit its speech prohibition to "nonairport-related" speech.[1] Petitioners further submit that the lines the NFM calls for

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[1] The Federal Circuit, 288 F.3d at 1319 n. 7, 1321, cites *Jews for Jesus* at pages 574-575 for the proposition that an entirely unreasonable restraint will be held unconstitutional. But it does not cite the portion of the opinion at p. 576 in which the Court, in what it assumed to be a nonpublic forum for purposes of analysis, rejected

VA officials to draw (*i.e.*, the lines between "commemorat[ing] military service and forbidden viewpoints) are at least as "murky" as that held impermissible in *Jews for Jesus*. But unquestionably, both the Federal Circuit and the Solicitor *believe* they are without Supreme Court guidance in this area. That belief alone should induce the Court to grant the petition.

The Federal Circuit, 288 F.3d at 1323-1325 (Pet. App. A23-26), held that the amount of discretion conferred by the VA is reasonable in light of the special nature of a national cemetery. The Solicitor argues (Opp. at 10-11) that Petitioners "fail to account for the greater leeway" the First Amendment gives government to regulate speech in a nonpublic forum. Significantly, as discussed *supra*, the discretion § 1.218(a)(14) confers is unlimited and is not constrained by the VA's flag manuals. The Federal Circuit and the Solicitor thus endorse unlimited discretion in certain, special nonpublic fora.

Logically, there are only three possible rules with respect to whether unlimited discretion is permissible in a nonpublic forum. Unlimited discretion is either (1) always acceptable in a nonpublic forum; (2) never acceptable; or (3) acceptable in some nonpublic fora but not others. No one advocates option (1). The Solicitor (Opp. at 10-11) and the Federal Circuit, 288 F.3d at 1324-1325 (Pet. App. A23-26) adopt option (3), based on the special nature of a national cemetery. Their proposed rule, however, requires that a line be drawn between those nonpublic fora where unbridled

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the airport vs. non-airport distinction as too "murky" to pass First Amendment muster. The Solicitor does not mention *Jews for Jesus* at all in his opposition, although Petitioners argued the case (Pet. at 16).

discretion is permitted and those more special "fora" where it is not. In most, if not all, cases such a line would be impossible to draw.

One need not denigrate the importance of maintaining the tranquility and dignity of a national cemetery to recognize that a similar argument can be made for virtually every nonpublic forum. Other circuits have held that government's interests in assuring that local government operates without disruption, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 573 (7th Cir. 2001), that drivers avoid fatal accidents by finding rest at roadside stops, *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991), that violent incidents of "road rage" do not occur on the highways, *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001), or that passengers move without disturbance through an airport, *Atlanta Journal and Constitution v. City of Atlanta*, 277 F.3d 1322 (11th Cir. 2002), do not justify the exercise of unlimited official discretion in a nonpublic forum. If the interest in maintaining the atmosphere in a national cemetery calls for a different result, a hierarchy of fora must be established, based on some discernible criteria. The above cases suggest that in most cases, the line between the more- and less-protected nonpublic fora would be impossible to draw. Therefore the only workable rule is (2), *i.e.*, that unbridled discretion is *never* acceptable in a nonpublic forum. This is the position the Federal Circuit rejected as "extreme." 288 F.3d at 1321 (Pet. App. A18). Petitioners submit that the opinion below further confuses this area of the law by establishing a chaotic hierarchy of nonpublic fora, in some, but not all, of which unbridled discretion is permissible. To bring order to this chaos the Court should grant review.

II. The VA Regulations Pose a Substantial Threat to Free Expression.

The Solicitor defends (Opp. at 11-12) the Federal Circuit's holding, 288 F.3d at 1325-1326 (Pet. App. A26-30), that Petitioners purportedly failed to show that the VA's regulations pose a "real and substantial risk to protected speech." The court seems to require an evidentiary showing on this issue, although it acknowledges that "the opportunity to present [such] evidence is limited if a facial challenge may be brought only in an appellate court..." *Id.* at 1326 (Pet. App. A26).[2] The court does not say what the showing would have to prove or how Mr. Griffin might go about presenting the evidence. As pointed out in the Petition (at 26-27), no such showing was required in *Jews for Jesus*. Contrary to the decision below and the Solicitor (Opp. at 11-12), however, Petitioners satisfy *this Court's* criteria for showing such a "real and substantial risk" to speech. In *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 758-759 (1988) the Court held that a "real and substantial" threat to free speech existed where (1) the ordinance required newspapers to apply annually for newsrack licenses; and (2) the ordinance was "directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers."

Section 1.218(a)(14) meets both criteria. A person or organization seeking to display a flag or hold any kind of group event at an NCA cemetery must apply for permission from the VA, not just annually but each time they wish to speak. Section 1.218(a)(14) also is narrowly focused on speech and expressive conduct. Petitioners' challenge thus satisfies *Lakewood*'s

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[2] The court did not suggest what kind of evidence Petitioners might offer to meet this requirement. Perhaps Petitioners would be required to show how many persons have been arrested by the VA, the number of visitors to VA cemeteries or other facts.

requirement of a "real and substantial threat." The Federal Circuit, however, ignores this aspect of the *Lakewood* opinion. The Court should grant review to clarify whether satisfying the *Lakewood* is enough to permit a facial challenge to succeed.[3]

III. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT PROCEDURAL SAFEGUARDS ARE REQUIRED IN A NONPUBLIC FORUM.

The Solicitor asserts (Opp. at 15) that procedural safeguards are only required when government seeks to shield the public from offensive speech, not in this case because the VA's regulations purportedly are "content-neutral." This assertion is not only wrong; it borders on being disingenuous. Section 1.218(a)(14)(ii) prohibits "commentary... in support of, or in opposition to, or attempting to influence any current policy" of the federal government or any private group. This prohibition is expressly content- and indeed viewpoint-based. Similarly, the VA's flag manuals distinguish among Confederate flags, "[c]ertain other flags," the United States flag and the POW/MIA flag. The difference among these flags is purely one of content and viewpoint.

Throughout more than two years of litigation, moreover, the VA's mantra has been that the Confederate flag sends a message that is inappropriate in a national cemetery 363 days a year. In the district court, the VA continually referred to the Confederate flag as

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[3] As the dissent noted, the VA's regulations affect all speech at all VA properties, including its vast network of hospitals and offices, as well as its 119 cemeteries. *Griffin*, 288 F.3d at 1321 (Dyk, J., concurring in part and dissenting in part). A government regulation of such breadth clearly reaches a substantial amount of speech.

a "symbol of racial intolerance and divisiveness." *Griffin v. Dept. of Veterans Affairs*, 129 F. Supp. 832, 843 (D. Md. 2001), *rev'd*, 274 F. 3d 818 (4th Cir. 2001). The purported message of the Confederate flag – *i.e.*, content and viewpoint – are at the heart of the Fourth Circuit's decision, 274 F.3d 818, which Mr. Griffin has asked the Court to review in Case No. 01-1687. For the Solicitor now to claim that the VA's speech regulations are "content-neutral" is the very opposite of its consistent and strident theme throughout two years of litigation.

The Federal Circuit held (Pet. App. A.31) that the "procedural safeguards requirement provides little or no independent basis for striking down a regulation in a nonpublic forum." But as the Court recognized in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226-227 (1990) and *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965), where government officials have unlimited time to issue a license to speak, the prospect of indefinite delay poses the same threat to speech as unbridled discretion to exclude speech. The policy against censorship in nonpublic fora therefore requires procedural safeguards. *Jews for Jesus*, 482 U.S. at 576, and the dissent in *Arkansas Educ. Tel. v. Forbes*, 523 U.S. 666, at 683-686 (1998), support the proposition that *Shuttlesworth* applies, or should apply, in a nonpublic forum. By the logic of *FW/PBS* and *Freedman*, procedural safeguards are equally necessary in nonpublic fora. Without them, censorship and self-censorship still threaten speech.

Contrary to the Federal Circuit's reasoning, 288 F.3d at 1328-1329 (Pet. App. A.32), the VA's regulations do not limit the time within which VA officials may grant or withhold permission to speak. Section 1.218(a)(14) imposes no time limits whatsoever. The only limitations of any kind are found in the NFM, but they do

not apply outside the flag context, and even within that context are ineffective. For example, the NFM provides no time limits for a standard request to display a flag under ¶2d. Contrary to the Solicitor's argument (Opp. at 15), although ¶ 2b. sets some time limits with respect to requests for a deviation from normal VA flag policy, a "gap" in the process permits indefinite delay.[4] The Court held a similar defect, the absence of a time limit within which necessary inspections were to occur, fatal to the challenged regulation in *FW/PBS*, 493 U.S. at 227.

Only two procedures (initial requests under ¶ 7c. to display the Confederate flag on the two permitted days and requests under ¶ 7d. to hold ceremonies with a Confederate flags on additional days) in the NFM are subject to time limits. VA decisions with respect to non-flag speech and almost all of its decisions concerning flag displays thus are subject to indefinite delay. Without doubt the issue of whether procedural safeguards are required in a nonpublic forum is squarely presented in this case.

CONCLUSION

For the reasons discussed herein, Mr. Griffin respectfully suggests that the petition for certiorari should be granted.

Respectfully Submitted,

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[4] A request for a deviation goes from the cemetery director to the Memorial Service Network ("MSN") Director, and then from the MSN Director to the Deputy Under Secretary for Operations ("DUO"). The MSN Director is under no time limit to forward the application to the DUO. A deviation request thus is subject to indefinite delay.

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